TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~418~~ 6

GEORGE D. SNOW, IMPLEADED WITH P. B. CLARK, AS EXECUTOR OF JOHN GORDON, DECEASED, PLANTIFF IN ERROR,

vs.

GEORGE W. CHAPMAN, EXECUTOR OF EUNICE CHAPMAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED MARCH 28, 1873.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between George W. Chapman, executor of the last will and testament of Eunice Chapman, deceased, and George D. Snow, impleaded with P. B. Clark, as executor of the last will and testament of John Gordon, deceased, a manifest error hath happened, to the great damage of the said George D. Snow, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
2 therein to correct that error what of right and according to the customs and laws of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 26th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

3 The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit in the within writ mentioned:

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the judges of the Supreme Court of the United States within mentioned in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 23d day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

(Indorsed:) U. S. Sup. Court. Geo. D. Snow, ex. pl'ff in error, vs. Geo. W. Chapman, ex. def't in error. Writ of error. Filed Oct. 26, 1872. H. E. Mann, clerk. A. G. Chatfield, att'y for pl'ff in error.

5 UNITED STATES OF AMERICA, *ss:*

To George W. Chapman, executor of the last will and testament of Eunice Chapman, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein George D. Snow, impleaded with P. B. Clark, executors of the last will and testament of John Gordon, deceased, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 26 day of October, in the year of our Lord one thousand eight hundred and seventy-two.

R. R. NELSON,
Judge.

6 (Indorsed:) U. S. Sup. Court. George D. Snow, pl'ff in error, vs. George W. Chapman, def't in error. Citation.

Due service of the within citation is admitted, this 26th day of October, 1872.

R. B. GALUSHA, &
W. D. HEARD,
Att'ys for Pl'ff.

Filed Oct. 26, 1872.

H. E. MANN, *Clerk.*

7 *Schedule referred to in foregoing return.*

United States circuit court, district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR OF THE last will and testament of Eunice Chapman, deceased,
vs.
GEORGE D. SNOW AND P. B. CLARK, EXECUTORS of the last will and testament of John Gordon, deceased.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota:

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, came the said plaintiff by R. B. Galusha, his attorney, and filed in the clerk's office of said court his complaint, in the words and figures following, viz:

United States circuit court, district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR OF THE last will and testament of Eunice Chapman, deceased,
vs.
GEORGE D. SNOW AND P. B. CLARK, EXECUTORS of the last will and testament of John Gordon, deceased.

8 The complaint of George M. Chapman, plaintiff in the above-

entitled action, shows to this court and states that he is a citizen of the State of New York; and that the said defendant George D. Snow is a citizen of the State of Minnesota, and the said defendant above named is a citizen of the State of California. And said plaintiff further says that he now is, and was at the commencement of the action hereinafter referred to, and ever since said time, the duly appointed and qualified executor of the last will and testament of Eunice Chapman, deceased, above named.

And plaintiff further says that, on the 4th day of January, 1864, he did, as such executor of the last will and testament of Eunice Chapman above named, in an action wherein he, as such executor, was plaintiff, and the said John Gordon, (impleaded with John W. Brooks and James Root,) above named, then in full life, was a defendant, which action was then pending in the supreme court of the State of New York for the county of Kings, recovered a judgment therein against said John Gordon for the sum of four thousand seven hundred and fifty-nine dollars and eighty cents; that said judgment is unreversed and unsatisfied, and is still in full force, and has never been paid, either in whole or in part, but is now wholly due and unpaid.

And plaintiff further says that since the rendition of said judgment as aforesaid, and prior to the commencement of this action, the said John Gordon has departed this life, leaving a will, appointing the defendants above named his executors; and said defendants have,
9 since said Gordon deceased, and prior to the commencement of this action, been duly appointed the executors of said will, and have duly qualified as such, and now are the executors of the said will of the said John Gordon, deceased.

And plaintiff further says that, at the times above named, the said supreme court above named was a court of general jurisdiction, and that the summons in said action above referred to was duly served upon the said John Gordon.

Wherefore plaintiff demands judgment against said defendant's executors as aforesaid, and each of them, for the sum of four thousand seven hundred and fifty-nine and $\frac{80}{100}$ dollars, with interest thereon from the 4th day of January, 1864, and costs of suit.

R. B. GALUSHA,
Attorney for Plaintiff, St. Paul, Minn.

STATE AND DISTRICT OF MINNESOTA, *ss:*

R. B. Galusha, being duly sworn, says he is the attorney of the plaintiff in this action, and that the foregoing complaint is true, to the best of his knowledge, information, and belief; and the reason this verification is not made by the plaintiff is that he is not a resident of, nor now within, the State of Minnesota, where affiant, his attorney, resides.

R. B. GALUSHA.

Subscribed and sworn to before me this 7th January, 1869.

H. E. MANN, *Clerk.*

And afterwards, to wit, on the seventh day of January, A. D. 1869,
a writ of summons was duly issued out of said court, under
10 the seal thereof, and in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Minnesota, ss:

In the circuit court of the United States for the district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR OF THE last will and testament of Eunice Chapman, deceased,
against
GEORGE D. SNOW AND P. B. CLARK, EXECUTORS of the last will and testament of John Gordon, deceased.
} Summons.

The President of the United States of America to the defendants above named, greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey, and State of Minnesota, and file your answer in said clerk's office within thirty days after the service hereof, excluding the day of such service; and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of four thousand seven hundred and fifty-nine and $\frac{80}{100}$ dollars, with interest thereon from the fourth day of January, 1864, besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in
11 said district of Minnesota, this seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independence the ninety-third year.

[SEAL OF SAID COURT.] H. E. MANN, *Clerk.*

R. B. GALUSHA,
Plaintiff's Attorney.

Which said summons was afterwards duly returned into said clerk's office, indorsed by the marshal of the district of Minnesota in the words and figures following, viz:

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that I served the within summons on the within-named George D. Snow, personally, at Le Sueur, in said district, Jan'y 8th, 1869.

CHA'S EATON,
U. S. Marshal.
By GEORGE W. TAYLOR,
Spe. Dep'y.

Service, $2.00; R. R. fare, 9.00; ex., 2.00—$13.00.

And afterwards, to wit, on the 29th day of July, A. D. 1869, came the said defendant, George D. Snow, by A. G. Chatfield, his attorney, and filed in the clerk's office of said court his answer to the said plaintiff's complaint in the words and figures following, viz:

12 In the circuit court of the United States for the district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR OF THE last will and testament of Eunice Chapman, deceased,
ag'st
GEORGE D. SNOW AND P. B. CLARK, EXECUTORS of the last will and testament of John Gordon, deceased.

George D. Snow, one of the above-named defendants, answering for himself only the plaintiff's complaint in the above-entitled action, respectfully shows to this court—

That he admits that the said George M. Chapman is a citizen of the State of New York; that the said P. B. Clark is a citizen of the State of California, and that this defendant is a citizen of the State of Minnesota.

That as to whether or not the said plaintiff now is, or ever was, the duly appointed or qualified executor of the last will and testament of Eunice Chapman, deceased, this defendant has not knowledge or information sufficient to form a belief.

And this defendant, further answering, admits that the said P. B. Clark and this defendant were named in the last will and testament of the said John Gordon, deceased, as the executors thereof; but this defendant says that he never accepted or received the said offer or trust of executor of the last will and testament of the said John Gordon, deceased, and that he never qualified or acted as executor of the
13 said last will and testament of the said John Gordon, deceased; and so this defendant says that he is not, nor ever was, executor of the last will and testament of the said John Gordon, deceased; and he also says that he never, as such executor, received or administered any of the goods, chattels, rights, credits, or property which were of the said John Gordon, deceased, at the time of his death.

And this defendant, further answering, says that most of the goods, chattels, rights, credits, and property which were of the said John Gordon, deceased, at the time of his death, were then situated in the State of California, and the principal part thereof were then in the city and county of San Francisco, in said State; that, after the death of the said John Gordon, his last will and testament was duly proved and recorded in the probate court in and for the said city and county of San Francisco, in the State of California, which said court of probate then and there had, and since that time has had, jurisdiction of the said last will and testament of the said John Gordon, deceased, and of the estate in California of which he died siezed or possessed, and of the administration thereof, under the provisions and terms of the said will and the laws of the said State of California; that upon the probate and recording of the said last will and testament of the said John Gordon, deceased, in the said probate court in the said city and county of San Francisco, as aforesaid, letters-testamentary in due form of law were by the same probate court issued and delivered to the said P. B. Clark, one of the persons named in and appointed by the said will as executor thereof; that the said P. B. Clark then and there accepted the said letters-testamentary and the office and trust of executor of the
14 said last will and testament of the said John Gordon, deceased, and duly qualified as such executor, and solely and without join-

UNITED STATES OF AMERICA,
District of Minnesota, ss:

In the circuit court of the United States for the district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR OF THE last will and testament of Eunice Chapman, deceased,
against
GEORGE D. SNOW AND P. B. CLARK, EXECUTORS of the last will and testament of John Gordon, deceased.
} Summons.

The President of the United States of America to the defendants above named, greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey, and State of Minnesota, and file your answer in said clerk's office within thirty days after the service hereof, excluding the day of such service; and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of four thousand seven hundred and fifty-nine and $\frac{80}{100}$ dollars, with interest thereon from the fourth day of January, 1864, besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in
11 said district of Minnesota, this seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independence the ninety-third year.

[SEAL OF SAID COURT.] H. E. MANN, *Clerk.*

R. B. GALUSHA,
Plaintiff's Attorney.

Which said summons was afterwards duly returned into said clerk's office, indorsed by the marshal of the district of Minnesota in the words and figures following, viz:

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that I served the within summons on the within-named George D. Snow, personally, at Le Sueur, in said district, Jan'y 8th, 1869.

CHA'S EATON,
U. S. Marshal.
By GEORGE W. TAYLOR,
Spe. Dep'y.

Service, $2.00; R. R. fare, 9.00; ex., 2.00—$13.00.

And afterwards, to wit, on the 29th day of July, A. D. 1869, came the said defendant, George D. Snow, by A. G. Chatfield, his attorney, and filed in the clerk's office of said court his answer to the said plaintiff's complaint in the words and figures following, viz:

12 In the circuit court of the United States for the district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR OF THE last will and testament of Eunice Chapman, deceased,
ag'st
GEORGE D. SNOW AND P. B. CLARK, EXECUTORS of the last will and testament of John Gordon, deceased.

George D. Snow, one of the above-named defendants, answering for himself only the plaintiff's complaint in the above-entitled action, respectfully shows to this court—

That he admits that the said George M. Chapman is a citizen of the State of New York; that the said P. B. Clark is a citizen of the State of California, and that this defendant is a citizen of the State of Minnesota.

That as to whether or not the said plaintiff now is, or ever was, the duly appointed or qualified executor of the last will and testament of Eunice Chapman, deceased, this defendant has not knowledge or information sufficient to form a belief.

And this defendant, further answering, admits that the said P. B. Clark and this defendant were named in the last will and testament of the said John Gordon, deceased, as the executors thereof; but this defendant says that he never accepted or received the said offer or trust of executor of the last will and testament of the said John Gordon, deceased, and that he never qualified or acted as executor of the
13 said last will and testament of the said John Gordon, deceased; and so this defendant says that he is not, nor ever was, executor of the last will and testament of the said John Gordon, deceased; and he also says that he never, as such executor, received or administered any of the goods, chattels, rights, credits, or property which were of the said John Gordon, deceased, at the time of his death.

And this defendant, further answering, says that most of the goods, chattels, rights, credits, and property which were of the said John Gordon, deceased, at the time of his death, were then situated in the State of California, and the principal part thereof were then in the city and county of San Francisco, in said State; that, after the death of the said John Gordon, his last will and testament was duly proved and recorded in the probate court in and for the said city and county of San Francisco, in the State of California, which said court of probate then and there had, and since that time has had, jurisdiction of the said last will and testament of the said John Gordon, deceased, and of the estate in California of which he died siezed or possessed, and of the administration thereof, under the provisions and terms of the said will and the laws of the said State of California; that upon the probate and recording of the said last will and testament of the said John Gordon, deceased, in the said probate court in the said city and county of San Francisco, as aforesaid, letters-testamentary in due form of law were by the same probate court issued and delivered to the said P. B. Clark, one of the persons named in and appointed by the said will as executor thereof; that the said P. B. Clark then and there accepted the said letters-testamentary and the office and trust of executor of the
14 said last will and testament of the said John Gordon, deceased, and duly qualified as such executor, and solely and without join-

ing this defendant with him in the said letters or in the execution of the said trust, entered upon the performance and discharge of his duties and trust as sole executor of the said last will and testament of the said John Gordon, deceased.

And this defendant, further answering, says that the said P. B. Clark, as sole executor of the said last will and testament of the said John Gordon, deceased, has fully administered all and singular the goods, chattels, rights, credits, and property which were of the said John Gordon, deceased, at the time of his death, and which have ever come to the hands of the said P. B. Clark as executor as aforesaid, to be administered; and that the said P. B. Clark had not, at the time of the commencement of this action, nor has he at any time since, had any goods, chattles, rights, credits, or property which were of the said John Gordon, deceased, at the time of his death, in the hands of him, the said P. B. Clark, as executor as aforesaid, to be administered.

And this defendant, further answering, says that he, the said P. B. Clark, having, as executor as aforesaid, fully and finally accounted to the said probate court in and for the said city and county of San Francisco in the matter of the estate of the said John Gordon, deceased, showing that he had paid over the moneys and delivered up the property of the said estate in accordance with the directions of the decree of distribution previously made by the said probate court, and had complied in all respects with the terms of the said decree, and had performed all the acts lawfully required of him.

15 And it having been shown to the said probate court that the said estate had been fully administered, and that no other property remained in the hands of the said P. B. Clark, as such executor, and that no further acts remained to be performed by him as such executor, it was, on the 12th day of January, 1869, at the city of San Francisco aforesaid, by the said probate court, in virtue of the power and authority lawfully vested therein, duly ordered, adjudged, and decreed that the said P. B. Clark, executor as aforesaid, had fully and faithfully discharged the duties of his trust, and he was then and there, by the said decree of the said probate court, wholly and absolutely discharged from all further duties and responsibilities as such executor, and his said letters-testamentary were by the said decree then and there vacated, and the said estate declared to be fully distributed and the trust settled and closed.

And this defendant, further answering, denies each and every allegation of fact in the said complaint contained, and not hereinbefore admitted or denied, except the allegation that the supreme court of the State of New York is a court of general jurisdiction.

This defendant therefore demands judgment against the said plaintiff for the lawful costs and disbursements of this defendant in this action, and that he be hence dismissed without day. Dated July 23rd, 1869.

A. G. CHATFIELD,
Attorney for defendant Geo. D. Snow.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

16 George D. Snow, being duly sworn, says that he is one of the defendants named in the foregoing answer; that he has read the said answer and knows the contents thereof; that the said answer is true of his own knowledge except as to those matters stated on

his information and belief, and that as to those matters he believes it to be true.

GEORGE D. SNOW.

Subscribed and sworn to this 29th day of July, 1869, before me.
WM A. SPENCER,
U. S. Commissioner, &c.

And afterwards, to wit, at a stated term of said court, begun and held at the city of St. Paul, in said district, on the third Monday, being the nineteenth day, of June, in the year of our Lord one thousand eight hundred and seventy-one. On the sixteenth day of said term, and on the 7th day of July, of said year, the following proceeding, among others, was had, viz:

GEORGE M. CHAPMAN, EXECUTOR, &C., }
vs.
GEORGE D. SNOW, EXECUTOR, &C. }

This cause came on to trial before the court, a jury trial being waived. Both parties appeared by their attorneys, and the cause is tried and submitted and held under advisement.

And at the same time the parties, by their attorneys, filed in said cause their stipulation in writing in the words and figures following, viz:

17 United States circuit court, district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR, &C., }
vs.
GEORGE D. SNOW, EXECUTOR, &C. }

It is hereby stipulated that a jury trial be and the same is hereby waived in this cause, and that the same be tried before the court without a jury.

R. B. GALUSHA,
Plaintiff's Attorney.
A. G. CHATFIELD,
Attorney for Geo. D. Snow, Defendant.

And afterwards, to wit, on the eighteenth day of said term and on the 10th day of July, A. D. 1871, the following proceeding, among others, was had, to wit:

GEORGE M. CHAPMAN, EXECUTOR, &C., }
vs.
GEORGE D. SNOW, EXECUTOR, &C. }

This cause having been tried before the court without a jury and submitted, and by the court held under advisement, and the court being fully advised in the premises, files its opinion directing judgment for plaintiff against defendant, Snow, for the sum of $7,264.25 and costs; whereupon, upon motion of defendant's, Snow's, attorney, ordered that all further proceedings herein be stayed for thirty days, and that that time be allowed said defendant to settle and file his bill of exceptions.

18 And afterwards, to wit, on the seventh day of March, A. D. 1872, came the said defendant, Geo. D. Snow, by his said attorney, A. G. Chatfield, and filed in the clerk's office of said court his bill of exceptions, duly signed, sealed, and allowed, and in the words and figures following, to wit:

19 Circuit court of the United States for the district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR OF THE last will and testament of Eunice Chapman, deceased,

vs.

GEORGE D. SNOW, IMPLEADER WITH P. B. Clark, executors of the last will and testament of John Gordon, deceased.

On the day of July, 1871, this cause came on to be tried before the Hon. R. R. Nelson, judge of the district court of the United States for the district of Minnesota, at the court-room in the city of Saint Paul, in said district, a jury trial being waived by the parties.

Upon the trial of the said action the plaintiff, by his counsel, offered in evidence a duly-certified copy of the record of the last will and testament of Eunice Chapman, deceased, and of the letters-testamentary issued thereon to the plaintiff, as executor of the last will and testament of the said deceased. The said certified copy of said record was from the surrogate's court in and for the county of Kings, in the State of New York.

20 To the admission of the said certified copy of the said record in evidence, the defendant, George D. Snow, by his counsel, objected, on the ground that the same was not competent or admissible to prove that the plaintiff was or is executor of the said last will and testament of the said deceased, as the said plaintiff has in and by his complaint *in* alleged; and the said defendant, by his counsel, claimed and insisted that to authorize or entitle the plaintiff to bring or maintain, as such executor, an action in the State of Minnesota, he must establish the fact that he is such executor by the proceedings and records required by the statute of the State of Minnesota, permitting an executor appointed in any other State or county to commence and prosecute, in his capacity of executor, an action in any court of this State. And the said judge did then and there give his opinion and decide that the said objection was not well taken, and did overrule the same, and admit and receive the said certified copy of said record in evidence, to which opinion and decision of the said judge the said defendant, by his counsel, did then and there except, and the said exception was allowed to be taken.

21 The plaintiff, by his counsel, then offered in evidence an exemplified copy of a judgment-roll in an action in the supreme court of the State of New York, in the county of Kings, in that State, commenced by Eunice Chapman against James W. Brooks, John Gordon, and James Root. A copy of the said roll or document, except the statement of the evidence and proceedings upon the trial of the said action contained in the same, is hereto annexed, marked "A," and made a part of this bill of exceptions.

To the admission of the said roll in evidence, the said defendant, George S. Snow, by his counsel, objected, on the ground of variance between the judgment mentioned in the complaint in this action, and the

judgment (if any) shown by the said roll. In the complaint in this action the judgment is alleged to be against John Gordon alone, while that mentioned in said roll is against John W. Brooks, John Gordon, and James Root. The said judge did then and there decide that the said objection was well taken, and did sustain the same; but it appearing to the said judge that the defendant was not misled or prejudiced, he then and there gave to the said plaintiff leave to so amend his complaint as to allege the said judgment to be against the said John
22 W. Brooks, John Gordon, and James Root, that being in accordance with the practice of the State court adopted by this court; and the said plaintiff, under and pursuant to said leave, did, before judgment, so amend his said complaint, and to the said decision of the said judge, granting to the said plaintiff said leave so to amend his said complaint, the said defendant, by his counsel, did then and there except, and the said exception was allowed to be taken.

The said defendant, by his counsel, did then and there further object to the admission of the said roll in evidence for the following reasons:

1. Because the said judgment is not, in and by the plaintiff's complaint in this action, sufficiently pleaded to admit evidence thereof. It is not pleaded of record, or that the court in which the said judgment was rendered was ever held by any judge or judicial officer.

2. Because the said roll does not contain any proper or competent evidence of any judgment whatever. It only states in general descriptive terms or language that judgment was entered, but when, or how, or where, is not stated. It does not contain a copy of the record of the judgment, and such record, or a properly proved copy of it, is the only competent evidence of its existence. The statement in the
23 said roll that judgment was rendered is mere hearsay that a judgment exists, and is not evidence of its terms or contents; and

3. Because the said roll does not contain any suggestion of the death of Eunice Chapman, by whom the action was commenced and prosecuted to verdict, or any evidence of the substitution of the plaintiff as executor of her will as plaintiff in said action. It does not contain anything to show that the judgment mentioned in it was founded upon the pleadings and verdict in favor of Eunice Chapman; and without evidence to connect the judgment in favor of George M. Chapman, executor, &c., with the pleadings and verdict in favor of Eunice Chapman, deceased, there is not any predicate for the judgment. There is not, in fact, any evidence to show that Eunice Chapman is dead.

The said judge did then and there give his opinion, and decide that the said further objections of the defendant to the admission of the said roll in evidence were not, nor was either of them, well taken, and did overrule the same, and admit and receive the said roll in evidence, and did decide and determine the same to be competent and sufficient evidence to prove and establish a judgment in favor of the plaintiff
24 as executor, &c., against the said John W. Brooks, John Gordon, and James Root; and that the same were sufficiently pleaded by the plaintiff in his complaint in this action; and to the said opinion and decision of the said judge, and to each and every part thereof, the said defendant, by his counsel, did then and there except, and his said exception was allowed to be taken.

The plaintiff, by his counsel, then offered in evidence a certified copy of the record of an order of the probate court of the county of Le Sueur, in the State of Minnesota, made at *at* a regular term thereof, held at the office of the judge of probate, in Le Sueur City, in said county of

Le Sueur, on the 3d day of June, 1867, a copy whereof is hereto annexed, marked "B." At the same time the said plaintiff also offered in evidence a certified copy of the record of the said last will and testament of John Gordon, deceased, and of the decree of the said probate court of the said county of Le Sueur, made at the time and place specified in the said former order, copies whereof are hereto annexed, marked "C."

To the admission in evidence of the said certified copy of the order of the 3d June, 1867, and of the said certified copy of the said will of John Gordon, deceased, and of the said decree of probate thereof, the said defendant, by his counsel, did then and there object, on the
25 ground that the said papers did not show that the probate court of the said county of Le Sueur had jurisidiction of the subject of said will, or lawful authority to make said order or decree of probate of said will. Said objection was founded on the provisions of section 7 of chapter 49, page 365, of the General Statutes of the State of Minnesota. The said judge did then and there give his opinion, and decide that the said objection of the said defendant to the admission of the said order of the said probate court, and the said decree of probate of said will in evidence, was not well taken in its application to either the said order or the said decree, and overruled the same, and admitted both the said order and the said decree of probate of said will in evidence; and to the opinion and decision of the said judge in its application to the said order and said decree, and each of them, the said defendant, by his counsel, did then and there except, and his exception was then and there allowed to be taken.

The plaintiff, by his counsel, then offered in evidence a certified copy of the record of letters-testamentary to George D. Snow and Pomeroy B. Clark, executors of the last will and testament of John Gordon, deceased, a copy of which is hereto annexed, marked "D."

26 To the admission of the said copy of the said record of the said letters-testamentary in evidence, the said defendant, by his counsel, then and there objected, on the ground that such letters could not issue until after the bond required by the statute (Gen. Stat., 367, ch. 50, sec. 2) had been given, nor until the defendant and Mr. Clark, or one of them, had accepted the trust. It did not appear that the defendant had ever accepted the trust or given the bond, or that such letters had ever been delivered to him, otherwise than by the recital in said letters "that George D. Snow and Pomeroy B. Clark, having complied with the provisions of the statutes," &c. The giving of the bond and the acceptance of the trust, being by the statute prerequisites to the issuance of the letters, and therefore jurisdictional, must be proved by the record thereof, or by the production of the bond itself. The recital in the letters that the persons named as executors had "complied with the provisions of the statutes, is not competent evidence that they had accepted the trust or given the bond, nor is the record of the letters evidence that the same were ever delivered to the persons named therein as executors. The said judge did then and there give his opinion, and decide that the said objection to the omission of the said certified copy of the said record of the said letters-testamentary
27 in evidence was not well taken, and did overrule the same; and to the said opinion and decision of the said judge the defendant, by his counsel, did then and there except, and his said exception was allowed to be taken.

The plaintiff had given defendant notice to produce, to be used as evidence upon the trial of this action, certain letters, to wit: A letter written by the plaintiff to the defendant, dated October 23d, 1867, and

a letter written by plaintiff to defendant, dated November 4th, 1867; a letter from George W. Paine, attorney at law, of New York, to defendant, dated February 11th, 1868; a letter from the same to the same, dated March 19th, 1868; a letter from the same to the same, dated in June, 1868; a letter from R. B. Galusha, to defendant, dated December 6th, 1868; a letter from the same to the same, dated December 30th, 1868; and a letter from the same to the same, dated November 18th, 1868; and all other letters received by said Snow from any or either of the said above-named persons in reference to said demand. The plaintiff, by his counsel, called upon the defendant's counsel to produce said letters, but the same were not produced. Thereupon the plaintiff, by his counsel, offered in evidence the deposition of the
28 plaintiff himself, taken in the city of New York, under a stipulation, together with certain letters by the defendant, (which were duly proven,) and which R. B. Galusha testified he had received from plaintiff, as his attorney, copies of which are hereto annexed, marked respectively "E," "F," "G," "H."

To the admission of the said deposition in evidence, the defendant, by his counsel, objected, on the grounds: 1. That the said deposition does not sufficiently identify any of the said letters with said notice, or sufficiently state the contents of them or either of them, (except the letter from plaintiff to defendant, dated Oct. 23d, 1867, the original of which the defendant then and there produced, a copy of which is hereto annexed, marked "1,") to make the same competent or admissible; and 2, That the contents of said letters, as the same appear in said deposition, are immaterial to any issue in this action. The said judge did then and there give his opinion, and decide that the said defendants' said objections to the admission of the said deposition in evidence was not well taken, and did overrule the same and admit and receive the said deposition in evidence, together with the said letters. And to the said opinion and decision of the said judge the defendant, by his coun-
29 sel, did then and there except, and his said exception was allowed to be taken.

The said deposition is filed of record in this court in this case, and in support of the said objections and exceptions the defendant prays leave to refer to the same, and such leave is hereby granted, and the same is hereby made a part hereof.

The plaintiff, by his counsel, then offered in evidence certain letters, to wit: Letter from R. B. Galusha to George D. Snow, dated November 18th, 1868; letter from the same to the same, dated December 6th, 1868; letter from the same to the same, dated December 11th, 1868; letter from the same to the same, dated Dec. 30th, 1868; letter from George D. Snow to R. B. Galusha, dated Nov. 20th, 1868; letter from the same to the same, dated Dec. 10*st*, 1868; letter from the same to the same, dated Jan'y 1st, 1869. The defendant admitted that the said letters were genuine, and a copy of each of them is hereto annexed, marked respectively "J," "K," "L," "M," "N," "O," "P."

The defendant, by his counsel, objected to the admission of the said letters, or any or either of them, in evidence, on the ground that the same, and the contents thereof, and of each of them, were incompetent and immaterial to any issue in the case. The said judge did then
30 and there give his opinion and decide that the said objection to the admission of the said letters, and each of them, in evidence, was not well taken, and did overrule the same; and to the said opinion and decision of the said judge the defendant, by his counsel, did then and there except, and the said exception was allowed to be taken.

The plaintiff, by his counsel, called as a witness in his behalf R. B. GALUSHA, who, being sworn, testified in substance as follows:

I have had several conversations with the defendant. The first one was about the time when I brought this suit, in January, 1869. It was at Le Sueur, and, I think, after the commencement of this suit. He then said the estate of John Gordon, deceased, had been administered in California; that the plaintiff's claim was an unjust one, and that he had taken the course that he had to delay the proceedings here until the estate was administered in California. He said that his action had been influenced by the fact that he regarded the claim as an un-
31 just one, and that he thought he could defeat it by doing as he did. He expressed a doubt whether the estate would pay all the legacies. He said his wife had received her legacy, or part of it.

The defendant, by his counsel, objected to the admission of the testimony of this witness, on the ground that it was immaterial to any issue in the case. The said judge did give his opinion, and decide that the said objection was not well taken, and did overrule the same. And to the said opinion and decision of the judge the counsel for the defendant did then and there except, and the said exception was allowed to be taken.

The said witness, being cross-examined, further testified, in substance, as follows:

The defendant stated to me that the property of the said deceased was principally in California and New York. He said that the only things of the deceased that he had here were the clothing and watch, and a few things *the* he (deceased) had with him. I don't think anything was said by defendant about his being or not being executor, but there may have been. I knew that Clark (the other defendant) lived in California.

Being further examined on the part of the plaintiff, this witness further testified, in substance, as follows:

32 I understood from the defendant that the property belonging to the estate of Gordon was principally in notes for moneys loaned out in California, and uncollected.

The plaintiff rested, and the defendant, by his counsel, moved to dismiss the action on the ground: 1. That the plaintiff had failed to make a case or to show a cause of action against the defendant, either by pleadings or proofs; and 2. That the plaintiff had not proved the capacity of executor, in which he sues, by any competent evidence—by letters-testamentary issued in this State, or authority acquired under the statute of this State, to sue as such executor; and 3. That the judgment mentioned in the record offered and received in evidence, varies from that described in the complaint. [This 3d point was made—the order or decision allowing the plaintiff to amend his complaint as hereinbefore stated having been in fact made, but not reduced to writing when the plaintiff rested, nor was such amendment of the complaint in fact made until after the trial was closed, and the judge had taken the case under advisement.]

The said judge did give his opinion and decide that the defendant's said motion to dismiss was not well founded, and did overrule the
33 same; and to the said opinion and decision of said judge the defendant, by his counsel, did then and there except, and his exception was allowed to be taken.

GEORGE D. SNOW, the defendant, was sworn as a witness in his own behalf, and testified, in substance, as follows:

I heard Mr. Galusha testify. He came to Le Sueur; I can hardly tell what I said to him. The only delay that I spoke of to him was in regard to a suit between Hunt and Chapman, (the pl'ff.) I told him (Galusha) that I did not propose to pay this judgment. I think I said to him that Chapman would not own this judgment six months, as a man of the name of Hunt was suing Chapman for the recovery of this judgment—that is for the same money, and three thousand ($3,000) dollars more, and it was in reference to that suit I spoke of delay. I don't think there was anything said between me and Mr. Galusha about the probate proceedings in California. I never qualified or accepted the trust as executor under the will of John Gordon, deceased. San Francisco, in California, was Gordon's home. He went to California in 1849, and resided there after that time. He was a single man. I never
34 gave any bond as executor of Gordon's will. I never made any application to the probate court or judge of probate of Le Sueur County for letters-testamentary as executor of said will. I never made any written application to the said judge of probate to do anything under the will. Gordon died at my house on the 25th day of May, 1867. On the 1st day of June, 1867, I left the will in the office of the judge of probate in Le Sueur, and told the judge of probate that I wanted the will proved, so that I could send it to Mr. Clark, at San Francisco, in California. On that day the judge of probate gave me a certified copy of the will, which I sent to Clark, at San Francisco. At the next meeting of the probate court, which was on the first Monday of July, 1867, the judge of probate said he would act on the will. The will was then proved in the probate court. I then told the judge of probate that I wanted official copies of the will and probate to send to California. Such papers as he gave me I sent. I never kept any of the papers that he gave me. If any letters were issued by him they were sent to Clark. I never made any inventory or acted in any capacity as executor of said will. I never held myself out to Mr. Chapman or Mr. Galusha as executor.

35 On his cross-examination, the defendant further testified in substance as follows:

I did not know that I received from the probate court letters-testamentary. I paid the fees of the judge of probate and the expenses of Mr. Gordon's funeral.

(The plaintiff's counsel proposed to the following interrogatory: Did you receive into your hands any assetts of Mr. Gordon? To this question the defendant, by his counsel, objected, on the following grounds: 1. Because it was not cross-examination upon any subject concerning which the witness had testified upon his direct examination; and 2. Because there is not in the complaint any allegations touching such assets. The said judge did then and there decide that the said objection was not well taken, and did overrule the same; and to the said decision of the said judge the defendant, by his counsel, did then and there except, and his said exception was allowed to be taken.)

The witness then answered the question, in substance, as follows: Mr. Gordon had at my place, when he died, some clothing, trunks, and some other articles, and a watch that he gave me, in the will. I took these things into my possession. He had not there any notes, money, mortgages, or other securities. The whole value of what I received might have been $500. It was about that sum.

36 I never showed Mr. Galusha a certificate or other paper that

this estate was settled up in California. It was not my object in my action in reference to this matter to get the whole thing postponed until the estate was settled in California. I had not any intention to keep the plaintiff in the dark about the case. I answered the plaintiff's letters, and he drew his own inferences. I told Galusha not to sue me, as I thought it could be arranged, and I never asked any other favor. When I told Galusha not to sue, I did intend to get a delay, if I could, so that the estate could be settled up in California. I did not tell Galusha so.

On a further direct examination the defendant further testified as follows:

I referred to the action of Hunt against Chapman, (plaintiff,) when I spoke to Galusha about having it arranged.

The defendant then gave in evidence, without objection, a duly-certified copy of the decree of final distribution of the estate of the said John Gordon, deceased, under his will, made and entered by the probate court of the city and county of San Francisco, in the State of California, on the 11th day of January, 1869, and also a duly-certified copy of the decree of the final discharge of P. B. Clark, as the
37 executor of the last will and testament of the said John Gordon, deceased, made and entered by the said probate court of the said county and city of San Francisco, on the 11th day of January, 1869. A copy of each of the said decrees of the said probate court of the said city and county of San Francisco is hereto annexed, marked respectively "Q" and "R," and made part of the statement of facts in this case. The defendant then rested.

And because none of the said matters of evidence and fact, and none of the said objections and exceptions so offered and made to the opinions and decisions of the said judge, do appear upon the record of the said trial; therefore, upon the prayer of the said defendant, by his counsel, the said judge, finding the foregoing case containing exceptions to be conformable to the truth, has allowed the same, and hereto set his hand and seal, according to the statute in such case made, and the rules and course of practice of this court, on the 7th day of March, 1872.

[SEAL.] R. R. NELSON,
Judge of the U. S. Dist. Court, Dist. of Minnesota.

38 "A."

[SEAL.] The people of the State of New York, by the grace of God free and independent. To all to whom these presents may come, greeting:

Know ye that we, having inspected the files and records of our supreme court, at the city of Brooklyn, in the county of Kings, do find a certain judgment-roll remaining there on file, in words and figures following, to wit:

Supreme court.

EUNICE CHAPMAN
against
JOHN W. BROOKS, JOHN GORDON, AND JAMES ROOT.

Case and exceptions on the part of defendants, John W. Brooks and John Gordon.

This action came on for trial on the 14th day of October, 1863, at a

circuit court held at the city of Brooklyn, in the county of Kings, before the honorable John W. Brown, justice, and a jury.

The pleadings in this action are as follows:

SUPREME COURT, *County of Kings:*

39 EUNICE CHAPMAN *against* JOHN W. BROOKS, JOHN GORDON, & JAMES Root. } Summons for money. (Com. ser.)

To the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in this action, which is hereto annexed, and to serve a copy of your answer on me, at my office, No. 290 Broadway, in the city of New York, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer said complaint as hereby required, the plaintiff will take judgment against you for two thousand five hundred and sixty-six dollars and twenty-four cents, with interest thereon from the 18th day of October, 1867, besides costs.

Dated January 19th, 1863.

GEORGE W. PAINE,
Plaintiff's Attorney.

[U. S. int. rev. stamp, 50 c. canceled. G. W. P., Jan. 19th, 1863.]

SUPREME COURT, *County of Kings:*

40 *Complaint on promissory note.—Payee or bearer ag'st maker, two or more notes.*

EUNICE CHAPMAN *against* JOHN W. BROOKS, JOHN GORDON, & JAMES Root. }

The complaint of the above-named plaintiff respectfully shows to this court that the defendants heretofore, at New York, made their promissory note, in writing, bearing date on the 15th day of April, one thousand eight hundred and fifty-seven, whereby they promised to pay, six months after date, for value received, to the order of Isaac L. Hunt, at 215 Pearl street, the sum of twenty hundred sixty dollars ninety-nine cents; and also that the said defendants heretofore, at New York, made another promissory note, in writing, bearing date on the 15th day of April, one thousand eight hundred and fifty-seven, whereby they promised to pay, for value received, six months after date, at 215 Pearl street, the sum of five hundred and five dollars and twenty-five cents; and the said Isaac L. Hunt afterwards endorsed the said notes, in blank, and sold and transferred the same, so endorsed, before the maturity thereof, and the plaintiff purchased the same, so endorsed, and, although
41 the said notes became due and payable before the commencement of this action, yet the defendants have not paid the same nor any or either of them.

And the plaintiff further says that she is now owner and holder of the said notes, and that the defendants are justly indebted to [illegible] there-

this estate was settled up in California. It was not my object in my action in reference to this matter to get the whole thing postponed until the estate was settled in California. I had not any intention to keep the plaintiff in the dark about the case. I answered the plaintiff's letters, and he drew his own inferences. I told Galusha not to sue me, as I thought it could be arranged, and I never asked any other favor. When I told Galusha not to sue, I did intend to get a delay, if I could, so that the estate could be settled up in California. I did not tell Galusha so.

On a further direct examination the defendant further testified as follows:

I referred to the action of Hunt against Chapman, (plaintiff,) when I spoke to Galusha about having it arranged:

The defendant then gave in evidence, without objection, a duly-certified copy of the decree of final distribution of the estate of the said John Gordon, deceased, under his will, made and entered by the probate court of the city and county of San Francisco, in the State of California, on the 11th day of January, 1869, and also a duly-certified copy of the decree of the final discharge of P. B. Clark, as the
37 executor of the last will and testament of the said John Gordon, deceased, made and entered by the said probate court of the said county and city of San Francisco, on the 11th day of January, 1869. A copy of each of the said decrees of the said probate court of the said city and county of San Francisco is hereto annexed, marked respectively "Q" and "R," and made part of the statement of facts in this case. The defendant then rested.

And because none of the said matters of evidence and fact, and none of the said objections and exceptions so offered and made to the opinions and decisions of the said judge, do appear upon the record of the said trial; therefore, upon the prayer of the said defendant, by his counsel, the said judge, finding the foregoing case containing exceptions to be conformable to the truth, has allowed the same, and hereto set his hand and seal, according to the statute in such case made, and the rules and course of practice of this court, on the 7th day of March, 1872.

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The pleadings in this action are as follows:

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To the above-named defendants:

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Dated January 19th, 1863.

GEORGE W. PAINE,
Plaintiff's Attorney.

[U. S. int. rev. stamp, 50 c. canceled. G. W. P., Jan. 19th, 1863.]

SUPREME COURT, *County of Kings:*

40 *Complaint on promissory note.—Payee or bearer ag'st maker, two or more notes.*

EUNICE CHAPMAN *against* JOHN W. BROOKS, JOHN GORDON, & JAMES Root. }

The complaint of the above-named plaintiff respectfully shows to this court that the defendants heretofore, at New York, made their promissory note, in writing, bearing date on the 15th day of April, one thousand eight hundred and fifty-seven, whereby they promised to pay, six months after date, for value received, to the order of Isaac L. Hunt, at 215 Pearl street, the sum of twenty hundred sixty dollars ninety-nine cents; and also that the said defendants heretofore, at New York, made another promissory note, in writing, bearing date on the 15th day of April, one thousand eight hundred and fifty-seven, whereby they promised to pay, for value received, six months after date, at 215 Pearl street, the sum of five hundred and five dollars and twenty-five cents; and the said Isaac L. Hunt afterwards endorsed the said notes, in blank, and sold and transferred the same, so endorsed, before the maturity thereof, and the plaintiff purchased the same, so endorsed, and, although the said notes became due and payable before the commence-
41 ment of this action, yet the defendants have not paid the same nor any or either of them.

And the plaintiff further says that she is now owner and holder of the said notes, and that the defendants are justly indebted to h, there-

upon in the sum of twenty-five hundred sixty-six dollars twenty-four cents, principal and interest, together with all costs, disbursements, and expenses of this action, said interest from 18th October, 1857. The said defendants, at the time of the execution of said notes, were partners under the firm-name of Gordon, Brooks & Root, and executed said notes in their said firm-name.

Wherefore the plaintiff demands judgment against the defendants for the said principal sum and interest.

GEO. W. PAINE,
Plaintiff's Attorney.

COUNTY OF KINGS, *City of Brooklyn, ss:*

Eunice Chapman, plaintiff in this action, being duly sworn, says that the foregoing complaint is true to her own knowledge, except as to the matters therein stated to be on information and belief, and, as to those matters, she believes it to be true.

EUNICE CHAPMAN.

Sworn to before me this 10th day of January, 1863.
C. C. SMITH, JUN.,
Comm'r of Deeds.

42 Supreme court, county of Kings.

EUNICE CHIPMAN
against
JOHN W. BROOKS, JOHN GORDON, AND JAMES Root.

The defendants, John W. Brooks and Joh. Gordon, for answer to the complaint in this action, say that they have no knowledge nor information sufficient to form a belief that either of the notes mentioned in said complaint was ever sold by the said Isaac L. Hunt, named therein, nor that either of them was ever transferred to the said plaintiff, and they deny that the said plaintiff purchased either of the said notes.

The said defendants deny that they have not paid said notes, or either of them.

They deny that said plaintiff is the lawful holder and owner of said notes, or either of them, or that they are indebted to her in any sum.

And said defendants, for a further answer and defence, say that, after the maturity of the notes mentioned in said complaint, and before the alleged transfer thereof to said plaintiff, the said firm of Gordon, Brooks & Root settled the same, and each of them, and paid the amount found due thereon on such settlement, and that the
43 owner and holder of said notes at that time received the amount so paid by said defendants, and that said defendants were then, and are still, entitled to have said notes, and each of them, delivered up to them; and they pray that said plaintiff may be adjudged to deliver said notes to them to be cancelled.

And said defendants also pray that the complaint in this action may be dismissed, and that the plaintiff may be adjudged to pay them their costs herein.

ALFRED ROE,
Att'y for Defendants Brooks & Gordon,
128 *Broadway, New York City.*

CITY AND COUNTY OF NEW YORK, *ss:*

John W. Brooks, one of the defendants in this action, being duly sworn, says that he is acquainted with the facts stated in the foregoing answer, and that said answer is true to his own knowledge, except as to the matters therein stated on information and belief, and, as to those matters, he believed it to be true.

J. W. BROOKS.

Sworn to before me this 10th day of March, 1863.

E. P. CLARK,
Notary Public, City of New York.

(Then follows statement of evidence produced by either party upon the trial of said action, and of the proceedings upon said trial.)

44 The jury thereupon found a verdict for the plaintiff for $4,642.52.

At a special term of the supreme court held in and for the county of Kings, at the city-hall, in the city of Brooklyn, on the 21st day of December, A. D. 1863.

Present: Hon. John A. Lott, justice.

GEORGE M. CHAPMAN, EXECUTOR OF THE last will and testament of Eunice Chapman, deceased,
against
JOHN W. BROOKS, JOHN GORDON, AND JAMES Root.

A motion having been made in this action, on behalf of the defendants herein, for a new trial of said action, and after hearing counsel for the respective parties, it is ordered that said motion be denied without costs.

A copy.

J. N. STEARNS, *Clerk.*

Supreme court, county of Kings.

GEORGE M. CHAPMAN, EXECUTOR, &C., PLAINTIFF, respondent,
against
JOHN W. BROOKS AND OTHERS, DEFENDANTS, appellants.

45 GENT.: Please take notice that John Gordon and John W. Brooks, two of the defendants above named, hereby appeal to the general term of this court from the order of the special term thereof, denying the motion for a new trial, made on behalf of the said defendants, and entered on the 21st day of December, 1863, and from each and every part of said order.

Dated New York, January 6th, 1864.

Yours, &c.,

ALFRED ROE,
Attorney for App'l'ts.

To J. N. STEARNS,
Clerk, &c.,
GEORGE W. PAINE,
Att'y for Resp't.

On the 4th day of January, 1864, judgment was entered against the defendants for $4,759.80, and the defendants Brooks and Gordon thereafter duly appealed therefrom, and served notice of appeal, as follows:

Supreme court, county of Kings.

GEORGE M. CHAPMAN, EXECUTOR OF EUNICE Chapman, deceased, plaintiff, respondent,
against
JOHN W. BROOKS, JOHN GORDON, AND JAMES Root, defendant, appellants.

46 GENTS: Please take notice that John W. Brooks and John Gordon, two of the defendants above named, hereby appeal to the general term of this court from a judgment entered therein, on the 4th day of January, A. D. 1864, in favor of Eunice Chapman for $4,759.80, and from each and every part of such judgment.

Dated New York, January 7th, 1864.

Yours, &c.,

ALFRED ROE,
Att'y for Appellant.

To J. N. STEARNS,
Clerk, &c.
GEORGE W. PAINE, Esq.,
Att'y for Resp't.

Supreme court.

At a general term of the supreme court, held for the State of New York, at Poughkeepsie, in the county of Dutchess, on the 12th day of May, A. D. 1864.

Present: Hon. John W. Brown, John A. Lott, W'm W. Scrugham, Jos. F. Barnard, justices.

GEORGE M. CHAPMAN, EXECUTOR, &C.,
against
JOHN W. BROOKS AND OTHERS.

Judgment and order refusing a new trial affirmed with costs.

[U. S. rev.-stamp 5 c., canceled.]

Opinion by Justice Brown.
Copy decision.

W. B. SHELDON, *Clerk.*

47 Supreme court.

GEORGE M. CHAPMAN, EXECUTOR OF EUNICE Chapman, deceased, plaintiff and respondent,
against
JOHN W. BROOKS AND JOHN GORDON, impleaded with James Root, defendant and appellant.

Judgment of affirmance on appeal, May 19th, 1864.

This action having been brought to a hearing upon an appeal of the defendant', John W. Brooks and John Gordon, from a judgment entered

herein in the office of the clerk of Kings County, on the 4th day of January, A. D. 1864, in favor of the above-named plaintiff, and against the said John W. Brooks and John Gordon and James Root, for the sum of four thousand seven hundred and fifty-nine dollars and eighty cents, and also upon an appeal of the said defendants Brooks and Gordon from the order of the special term of this court, denying the motion for a new trial, made on behalf said defendants Brooks and Gordon, and entered on the 21st day of December, 1863, in said clerk's office, and the decision of the court upon the said appeals having been filed, whereby the aforesaid judgment and order refusing a new trial are, in all things, affirmed with costs.

Now, on motion of George W. Paine, attorney for said plaintiff and
48 respondent, it is adjudged that said judgment and the said order be, and the same are hereby, in all things affirmed, and that said George M. Chapman, executor of Eunice Chapman, deceased, plaintiff and respondent, recover of John W. Brooks and John Gordon, the said defendants and appellants, the sum of sixty-one $\frac{64}{100}$ dollars, costs and disbursements on said appeal.

J. N. STEARNS,
Clerk of Kings County.

Filed May 19th, 1864—9.35 a. m.

"B."

In probate court.

STATE OF MINNESOTA, *County of Le Sueur, ss:*

IN THE MATTER OF THE ESTATE OF JOHN GORDON, DECEASED.

To John Gordon Russell, William Mortimer Russell, Agnes Cecilia Cornell, Margaret Gordon Russell, Isabella Smith and James B. Smith, her husband, Jennett Swift, Anna Maria Thompson, Marcus Kniffin, Harriet Cecelia Snow and George D. Snow, her husband, Margaret Elizabeth Hewitt and Thomas Porter Hewitt, her husband, Jane G. Kniffin, Georgiana Kniffin, Sarah Ann Kniffin, George C. Gordon, Agness Gordon, Pomeroy B. Clark, John Gordon Clark, legatees named in the will of John Gordon, deceased and all others interested in said estate.

49 At a regular term of the probate court, held at my office, in Le Sueur City, in and for the said county and State, on the 3d day of June, 1867, the last will and testament of the said John Gordon was delivered to this court, and application was made to this court by George D. Snow, one of the executors named in said will, to appoint a time and place of proving the said will, and allowing the same, and granting a decree of probate thereon.

Now, therefore, it is ordered that at the regular term of this court, in and for the said county of Le Sueur, to be held at my office in Le Sueur City, in said county of Le Sueur and State of Minnesota, on Monday, the 1st day of July, A. D. 1867, at 2 o'clock in the afternoon of that day, pro'f will be heard by the court in support of the said will and the execution thereof, and the same will then and there be proved.

And you and each of you, and all others interested in the said estate,

are hereby notified that at the said time and place you may appear and be heard to contest the allowance and probate of said will.

And it is further ordered that notice of the said time and place be given to all interested, by publishing this order and notice in "The Le Sueur Courier," a newspaper printed and published in the State
50 of Minnesto'a, for three weeks successively, previous to the time of hearing the proof of the same.

Witness my hand and the seal of this court, at Le Sueur City, in the County of Le Sueur and State of Minnesota, this 3d day of June, A. D. 1867.

[SEAL.] WILLIAM BACON,
Judge of Probate.

In probate court.—Special term.

STATE OF MINNESOTA, *County of Le Sueur, ss:*

I, Edward Hartly, judge of the probate court of said county, do hereby certify that I have compared the annexed copy of an order and notice to prove the last will and testament of John Gordon, deceased, with the original records preserved in said probate registry, and that the same is a true copy thereof, and of the whole of said original records.

In testimony thereof I have hereunto subscribed my name, and affixed the seal of the probate court of said county, at Le Sueur, in said county, his 17th day of February, A. D. 1870.

EDWARD HARTLY,
Probate Judge of Le Sueur County, Minn.

51 "C."

Know all men by these presents that I, John Gordon, now residing in Le Sueur, in the State of Minnesota, formerly a resident of San Francisco, in the State of California, being in ill health, but of sound and disposing mind and memory, do make and publish this my last will and testament, hereby disposing of all my property and effects in the manner following, to wit:

First. I hereby make, constitute, and appoint Pomeroy B. Clark, of San Francisco, in the State of Californ'a, and George D. Snow, of Le Sueur, Minnesota, my executors of this my last will and testament, constituting, appointing, and empowering my said executors to take charge of and carry into effect and operat'on, and fully car'y out all the provisions herein contained, without giving any bonds or security so to do, without ever being required so to give bonds or securities for the performance of any act connected with any bequest or trust herein created or specified.

"Second." I give and bequeath unto John Gordon Russell the sum of five thousand dollars, ($5,000.)

"Third." I hereby give and bequeath unto William Mortimer Russell the sum of five hundred dollars, ($500.)

"Fourth." I hereby give and bequeath unto Agnes Cecilia Cornell the sum of two thousand dollars, ($2,000.)

"Fifth." I hereby give and bequeath unto Margaret Gordon Russell the sum of six thousand dollars, ($6,000.)

52 "Sixth." I hereby give and bequeath unto Isabella Smith, wife of James B. Smith, the sum of six thousand dollars, ($6,000.)

"Seventh." I hereby give and bequeath unto Janette Russell, now known as Janette Swift, the sum of one thousand dollars, ($1,000.)

"Eighth." I hereby give and bequeath Anna Maria Russell, now known as Anna Maria Thompson, the sum of four thousand dollars, which said sum shall be paid by my executors unto Mr. Thompson, whose adopted daughter the said Anna Maria now is, and with whom she has lived since a small child, to be received and held by the said Thompson in trust for the said Anna Maria Russell until she arrives at the age of twenty-one years; the said Mr. Thompson shall pay over to the said Anna Maria the full sum of four thousand dollars, together with the interest accrued thereon, provided if it shall be necessary to use any portion of the interest of said money for the benefit and proper advantage of the said Anna Maria, the said Mr. Thompson can do so upon obtaining the free and full consent and permission of the said Anna Maria Russell; and I hereby desire that the said Mr. Thompson shall receive and execute the above trust, without being required to enter into bonds, or give security for the proper fulfillment
53 thereof, except receiving, receipting, and acknowledging the said money as a trust-fund for the benefit of the said Anna Maria Russell, to be paid to her as herein required.

Ninth. I hereby give and bequeath unto Marcus Kniffin the sum of five hundred dollars, ($500.)

Tenth. I hereby give and bequeath unto Harriet Cecilia Snow the sum of thirty thousand dollars, ($30,000.)

Eleventh. I hereby give and bequeath unto Margaret Elizabeth Hewit the following-described real estate, situate in the county of Le Sueur and State of Minnesota, to wit: The north half of the southeast quarter of section number one (1) in township No. one hundred and eleven, (111,) north of range twenty-six west, (26,) and the east thirty (30) acres of the northeast quarter of the southeast quarter of section No. six, (6;) also twenty acres in the northwest quarter of the southwest quarter of said section six, (6,) described as follows: commencing at the southwest corner of the northwest quarter of the southwest quarter of section six, (6;) thence east one hundred and twenty-nine rods; thence north twenty-four rods and four-fifths of a rod; thence west one hundred and twenty-nine rods; thence south twenty-four and $\frac{4}{5}$ rods, to the place of beginning; the last two pieces are in township No. one hundred and eleven, (111,) north of range No. twenty-five (25) west, and contains in all one hundred and thirty acres, more or less, together with all the appurtenances, buildings, and improvements thereon situated.

54 And I also give and bequeath unto the said Margaret Elizabeth Hewit all the personal property which is now situated upon the said above mentioned and described farm, and in possession of the said Margaret Elizabeth Hewit, or her *her* husband, of which I am the owner, or interested in any manner, save and except one house, being the house purchased by me of J. H. Porter on or about the first of May, 1867. And I also give and bequeath unto the said Margaret Elizabeth Hewit and to her heirs, subject to the following conditions, the sum of two thousand dollars, ($2,000,) the said sum of money to be paid by my executors unto George D. Snow, to be received by him and held in trust for the said Margaret Elizabeth Hewit, and the heirs of her body, during the natural life of the said Margaret Elizabeth Hewit, and at her death the said sum of two thousand dollars shall be paid in equal proportions to her children, provided they have attained the age of twenty-one years; if not, the said money shall be retained by the trustee until they attain the age of twenty-one years, when the same shall be paid to them,

together with the interest that may have accumulated thereon after the death of the said Margaret Elizabeth Hewit and the time each child attains the said age; and the said trustee shall take and receive the said sum of two thousand dollars to the use of the said Margaret
55 and her children, and shall properly, honestly, and fairly invest the same in such manner that the same may bring, at least, as much interest as would be drawn by United States stocks, and in such manner that the interest therein shall be paid at least once in each year; and the said trustee shall pay or cause to be paid unto the said Margaret Elizabeth Hewit, yearly, the amount of interest realized from the said two thousand dollars, after deducting the expense necessarily incurred in investing, collecting, and attending to the said trust-fund, and upon her death, if her heirs are not of age, to accumulate the interest for each until they are of age.

"Twelfth." I give and bequeath unto Laura Merrit the sum of one thousand dollars, ($1,000.)

"Thirteenth." I give and bequeath unto Jane Gordon Kniffin the sum of four thousand dollars, ($4,000.)

"Fourteenth." I give and bequeath unto Sarah Ann Kniffin and unto Georgianna Kniffin the sums of six thousand dollars, ($6,000,) to each of them, which said sums of six thousand dollars, for each of the girls, Sarah Ann and Georgianna, shall be paid by my executors unto George D. Snow, one of the executors herein appointed; and the said sums of six thousand dollars, for each, shall be by him received and held in trust for the said Sarah Ann and Georgianna Kniffin until they arrive at the age of twenty-one years, when the same shall be paid to them,
56 paying to each the said sum of six thousand dollars, and the accumulated interest that the said trustee has not at the time expended for their use and advantage, and at their request and free will.

"Fifteenth." I hereby give and bequeath unto George C. Gordon the sum of six thousand dollars, ($6,000.)

"Sixteenth." I hereby give and bequeath unto Agnes Gordon the sum of five thousand dollars, ($5,000.)

"Seventeenth." I hereby give and bequeath unto Susan Gordon the sum of two thousand dollars, ($2,000.)

"Eighteenth." I hereby give and bequeath unto Pomeroy B. Clark, of San Francisco, Cal., the sum of one thousand dollars, which sum shall be paid to him in United States gold coin, or its equivalent.

"Nineteenth." I hereby give and bequeath unto John Gordon Clark, of San Francisco, Cal., the sum of five hundred dollars, ($500,) which amount shall be paid in United States gold coin or its equivalent.

"Twentieth." After payment of all my debts, funeral expenses, and the payment of all the legacies and amounts hereinbefore specified, I hereby give and bequeath unto George D. Snow, one of the executors herein named, all the residue of all my property, real and personal, and personal effects, including trunks, watch, clothing, &c.

"Lastly." I desire that the settlement of my estate shall be made by my executors in such reasonable time as the same can be done,
57 without sacrificing the property, and that the said legacies and amounts specified herein should be paid to the proper parties in United States currency, or current funds equivalent thereto, except as specified above in the legacies to P. B. & John Gordon Clark, which are to be paid in coin. And I desire that the trustees appointed herein for any purpose or to receive any trust-fund, execute and perform their trust without being required to give any bond or security for the fulfillment thereof, only to receive the money in trust, and carry out the same

according to the specifications herein; and further, if for any cause there should not be funds enough to pay the said legacies and amounts above specified, then the deficiency is to be deducted pro rata from each amount, in the proportion it bears to the whole; and I hereby revoke and annul and make void all other and former wills and testaments, codicils, and bequests by me heretofore made, and declare the same to be of no effect whatever.

In testimony whereof I have hereunto set my hand and seal, and publish and declare this my last will and testament, having well studied and considered the contents hereof, and in the presence of the witnesses named below, this fourteenth day of May, A. D. eighteen hundred and sixty-seven.

JOHN GORDON. [SEAL.]

58 Signed, sealed, published, and declared by the said John Gordon as and for his last will and testament, in presence of us, who in his presence and in the presence of each other, and at his request, have subscribed our names as witnesses hereto.

J. H. SWAN.
E. R. SMITH.

STATE OF MINNESOTA,
County of La Sue'r, ss:

At a regular term of the probate court, held in and for said county and State, at the office of the judge of probate, in Le Sueur City, in said county, on the 1st day of June, A. D. 1867. W'm Bacon, judge of said court, presiding.

IN THE MATTER OF THE ESTATE OF JOHN GORDON, LATE OF SAID COUNTY, DECEASED.

Whereas this said term of court was the time appointed by the order of this court, dated on the 3d day of June, A. D. 1867, for proving the last will and testament of John Gordon, deceased, and whereas it appears to the satisfaction that the notice of the time and place of hearing the proof thereof had been given as required by the statutes and the said order made in this case, and whereas it appears to the satisfaction of this court by the evidence of J. H. Swan and E. R. Smith, the subscribing witnesses to the said will, who were each duly sworn and
59 examined in regard thereto before the court at the said July term thereof, that the said will to which this is annexed is the last will and testament of the said John Gordon, deceased, made, signed, executed, and published by him as such, and that he was at the time of executing and publishing the same of sound mind and memory, and that the said will was executed in all particulars as required by the statutes of this State; whereas it was then and there ordered and decreed that the said will be allowed and admitted to record by this court:

Now, therefore, be it remembered, that on this 1st day of July, A. D. 1867, the last will and testament of John Gordon, late of Le Sueur, Le Sueur County, Minnesota, being the within instrument hereto annexed, was duly proved before me, W'm Bacon, judge of probate in and for said county of Le Sueur, and State of Minnesota, and was by me allowed and recorded, as and for the last will and testament of all real and personal estate of the said John Gordon, deceased, and that the said will and testament, and the proofs, and examinations, and orders thereon are duly recorded in this office, and the executors therein named are hereby

fully empowered to execute and carry out the provisions of the said will.

In witness whereof I have hereunto set my hand and affixed
60 the seal of said court, at Le Sueur City, in said county of Le Sueur, State of Minnesota, this 1st day of July, A. D. 1867.

[SEAL]. WILLIAM BACON,
Judge of Probate.

[Revenue-stamp $50.00.]

In probate court.—Special term.

STATE OF MINNESOTA.
County of Le Sueur, ss:

I, Edward Harty, judge of the probate court of said county, do hereby certify that I have compared the annexed copies of the last will and testament of John Gordon, deceased, and the certificate of probate attached thereto, with the original records preserved in said probate registry, and that the same is a true copy thereof, and of the whole of said original records.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of the probate court of said county, at Le Sueur, in said county, this 23d day of February, A. D. 1870.

EDWARD HARTY,
Probate Judge of Le Sueur County, Minn.

(Endorsed:) In probate court. In the matter of the estate of John Gordon, deceased. Copy of will and certificate of probate. Certificate of transcript, Ex. 4, "C."

61 "D."

STATE OF MINNESOTA,
County of Le Sueur, ss:

At a regular term of probate court, held at Le Sueur City, in and for said county of Le Sueur and State of Minnesota, on the 1st day of July, A. D. 1867.

IN THE MATTER OF THE ESTATE OF JOHN GORDON, LATE OF LE SUEUR, IN SAID LE SUEUR COUNTY.

Whereas John Gordon, late of the town of Le Sueur, county of Le Sueur, and State of Minnesota, made in his life-time his last will and testament, and which, at a term of our said court, held on the 1st day of July, A. D. 1867, at the office of the judge of probate, was proved, and a decree of probate granted and admitted to record in said court, and probate granted to George D. Snow and Pomeroy B. Clark, the executors thereof and therein appointed, and that George D. Snow and Pomeroy B. Clark having complied with the provisions of the statutes in such cases made and provided; therefore, to the intent that the said will may be well and truly performed, we do give, grant, and covenant unto the said George D. Snow and Pomeroy B. Clark the administration of all and singular the goods, chattels, rights, credits, and estate aforesaid, and do hereby grant unto you, the said George D. Snow and Pomeroy B. Clark, full power and authority to administer all and singular the credits and estate of said deceased, which to him while
62 he lived, at the time of his death did appertain, and well and

truly to dispose of according to law; also, to demand, collect, recover, and receive, the rights and credits of said deceased, and pay all debts in which he stood bound, so far as the credits and estate aforesaid will enable you to do, and, having accepted said trust, you will make, or cause to be made, a true and perfect inventory of all and singular the credits of said deceased, and the same to return, or cause to be returned, to the probate court of the county aforesaid, on or before the 1st day of October, A. D. 1867, and also to return, or cause to be returned, to the said court, a true and just account of your administration in the premises, on or before the 1st day of July, A. D. 1867.

Given under my hand and official seal, this 1st day of July, A. D. 1867.

[SEAL.] W'M BACON,
Judge of Probate.

In probate court.—Special term.

STATE OF MINNESOTA,
County of Le Sueur, ss:

I, Edward Harty, judge of the probate court of said county, do hereby certify that I have compared the annexed copy of letters-testamentary, in the matter of the estate of John Gordon, deceased, with the original records preserved in said probate registry, and that the same
63 is a true copy thereof, and of the whole of said original records.

In testimony whereof I have hereunto sub my name, and affixed the seal of the probate court of said county, at Le Sueur, in said county, this 17th day of February, A. D. 1870.

EDWARD HARTY,
Judge of Probate of Le Sueur County, Minn.

"E."

OFFICE OF REGISTER OF DEEDS,
LE SUEUR COUNTY, MINNESOTA,
Le Sueur, October 30th, 1867.

GEORGE M. CHAPMAN, Esq.,
New York City:

DEAR SIR: Yours of October 23, introduced by J. M. Bradstreet & Son, came to hand this day, and contents noted. I have been aware of the judgment you spoke of for some time, and have regarded it as an unjust claim, as far as John Gordon is concerned. I understand the facts to be nearly as follows: In the year 1863, J. W. Brooks was indebted to some parties in New York some $4,000, and it was arranged that they should take Gordon, Brooks and Root's notes for the
64 debt of Brooks, payable at certain times and terms agreed upon, which notes was given, and as fast as they became due was paid to the original owners of the notes, but the notes was not given up at the time of payment, as they made some excuse that they had put them into some person's hands to keep for them, but that the person who held them was only an agent of theirs, and all would be straightened out in a short time. John Gordon being in San Francisco all this time, supposing all matters was straight, paid no attention to the matter. The note was sued, and a subpœna served on Brooks (who was not a partner of Gordon's at the time) when he was in New York, and not thinking the matter of any consequence paid no attention to it. Now, I do not see how Gordon's estate can be made liable for the debt. It looks

to me as if the matter should be settled by Mr. Brooks, who is a resident of New York, and the real party in interest, as far as the debt is concerned. I cannot see how Gordon's estate is made liable to pay the whole debt of the partners, when he was not in company with them at the time of obtaining the judgment, nor has he any of their funds.

I would like to have it arranged in some shape satisfactory to all, and I expect to pay what is right and equitable.

Respectfully yours,

GEORGE D. SNOW.

65 The estate of John Gordon is in the probate of this county, and, if any debts are against the estate, must be presented to me within the year.

"F."

OFFICE OF THE REGISTER OF DEEDS,
LE SUEUR COUNTY, MINN.,
Le Sueur, Nov. 20th, 1867.

G. M. CHAPMAN, Esq.,
New York City :

DEAR SIR: Yours of the 4th came to hand in my absence to Chicago, and I see you make a different story about that judgment than I was aware of. It will be necessary for you to send an exemplification of the judgment-roll, that the same may be filed in the probate court of this county; have full copies made of all the papers and certified by the clerk of court, and also a certification of a judge that the clerk is all right; get up all the papers with care, or I cannot get them through the court, as there is quite a number of heirs, and some would not wish to have the claims proved, if they could help it.

There is plenty of time to see if it cannot be collected out of Brooks, for the estate of Gordon cannot pay much before one year from this date, if as soon as that, for it is very much scattered. I am in
66 hopes that the matters will be arranged by Mr. Brooks before it will be necessary for you to look after the estate of Gordon, but if it cannot be, send it on here.

Respectfully yours,

GEORGE D. SNOW.

"G."

Received June 5th. Wrote to know when he would pay, & whether claim would be disputed.

LE SUEUR, MINN., *June 9th*, 1868.

GEORGE W. PAINE, Esq.:

DEAR SIR: I have received several letters—yours in reference to the claim of Mr. Chapman. I cannot hurry the settlement of the Gordon estate any faster than it is being done, and I do not see how any other attorney will help the matter, but he is at liberty to do with his claim as he sees fit.

Respectfully, yours,

GEORGE D. SNOW.

"H."

LE SUEUR, MINN., *February 20th*, 1868.

GEORGE W. PAINE, Esq.:
New York City:

SIR: Yours of the 11th Feb., with exemplification of judgment
67 in favor of G. W. Chapman, has been received, and I find that they are sufficiently full for my use, but if anything is necessary I will write for them.

Respectfully, yours,

GEORGE D. SNOW.

"I."

J. M. BRADSTREET & SON,
IMPROVED MERCANTILE AGENCY,
New York, Oct. 23d, 1867.

To GEORGE D. SNOW, Esq., *Le Sueur, Minn.:*

DEAR SIR: We have given your address to G. M. Chapman, esq., of New York City, and have assured him that, to the best of our belief, any business committed to your charge will be faithfully attended to at moderate rates.

Yours, most respectfully,

J. M. BRADSTREET & SON.

To GEO. D. SNOW, Esq.:

DEAR SIR: Above, I hand you letter of introduction from our mutual friends the Bradstreets. I also enclose transcript of a judgment obtained by me, as executor of my mother, in the supreme court, Kings County, against John W. Brooks, John Gordon, and James Root, docketed Jan'y 4, '64, for $4,759.80.

68 We are informed that the said John Gordon died in your county, in May last, and left $34,000 cash lent out in California, and other property; and in his will appointed P. B. Clark, of St. Francisco, and yourself, as his executors, and that the money is now in your hands as executor. We therefore enclose you this transcript of judgment, to prove our claim upon said estate, and if further proof is necessary under your laws, you will please inform us by return mail, what steps, if any, are necessary for us to take to receive this money.

If you can remit it to us without employing others we shall be happy to allow you the usual com's.

Trusting to your kindness and good offices in our behalf,

I remain respectfully, your ob. serv't,

G. M. CHAPMAN.

Direct to box No. 1782, post-office.

Please answer by return mail. Since writing, I find I have another judgment against the same persons, docketed May 19, '64, for $61.64, the proof of which I will send you when you inform me what is necessary.

"J."

GEORGE B. SNOW, Esq.,
Le Sueur, Minn.:

69 DEAR SIR: George M. Chapman, of New York, as ex. of Eunice Chapman, has placed in my hands for collection two judg-

ments against John Gordon, and others, one for $4,759.80, and the other $61.64, Jan'y 4, and May 19, 1864. I am informed that you are the executor of Mr. Gordon.

Please answer by next mail as to how you can arrange the matter.

Yours, respectfully,

R. B. GALUSHA,
Att'y at Law.

"K."

SAINT PAUL, MINN., *Dec. 5th*, 1868.

GEO. D. SNOW, Esq.,
Le Sueur, Minn.:

DEAR SIR: I am just in receipt of a letter from G. M. Chapman, ex., &c., who informs me that there is not the most remote prospect that Mr. Brooks will pay a dollar on the two judgments against Mr. Gordon and himself. That he repeatedly declined to pay, and cannot be forced to do so.

Mr. Chapman tells me that it will be useless to delay proceedings on the judgments in the hopes of getting anything out of Brooks, and instructs me to institute legal proceedings without further delay.

70 I hope, however, that the matter can be arranged without any such resort, and trust to hear favorably from you in that respect by next mail.

Yours, truly,

R. B. GALUSHA.

"L."

SAINT PAUL, MINN., *Dec. 11th*, 1868.

GEO. D. SNOW, Esq.,
Le Sueur, Minn.:

DEAR SIR: Yours of 10th inst. is at hand.

The judgment can be assigned to you in case you desire to hold it as a claim against Brooks, ag'st whom the judgment is valid, and could be enforced in case he had property out of which it could be made. Mr. Chapman writes as to this, that it cannot be collected from him now, the reason he resorts to other parties. Mr. C. does not authorize me to make any terms—simply directs me to collect. I presume, however, that he would grant some indulgence on a part of it. If you will make me a proposition to arrange by paying part down, with short time on balance, I will submit it to Mr. C. Please, however, to do so without delay, as Mr. C. seems very urgent in the matter, and my instructions are to proceed without delay.

Respectfully, yours,

R. B. GALUSHA.

71 "M."

SAINT PAUL, *Dec. 30th*, '68.

GEORGE D. SNOW, Esq.,
Le Sueur, Minn.:

DEAR SIR: I have been expecting for some days some proposition from you in regard to the claim of Mr. Chapman. Will you be good enough to write me, on receipt of this, what you propose to do in the

matter, as I do not wish to commence any proceedings if they can be avoided.

Truly, yours,

R. B. GALUSHA.

"N."

LE SUEUR, MINN., *Nov. 20th*, 1868.

R. B. GALUSHA, Esq.:

DEAR SIR: Yours of the 18th came to hand by last mail. In regard to the judgment of Chapman, I shall have to write Mr. Brooks, in New York City, about it. I supposed it was arranged by him before this time. I will write again as soon as I hear from him.

Respectfully, yours,

GEORGE D. SNOW.

72 "O."

LE SUEUR, MINN., *Dec. 10th*, 1868.

R. B. GALUSHA, Esq.:

DEAR SIR: Yours of the 6th came duly to hand and contents noted. Cannot the judgment be assigned to me and on what terms?

Chapman's lawyer once offered to sell the claim, but did not state any terms that he would assign it for. If Chapman has got a valid judgment, it seems to me that Brooks should pay his proportion.

Let me hear from you before you go any further.

Respectfully, yours,

GEORGE D. SNOW.

"P."

LE SUEUR, MINN., *Jan'y 1st*, 1869.

R. B. GALUSHA, Esq.:

DEAR SIR: Yours of the 30th Dec. received, and also one several days ago, which I did not answer for the reason that I had no propositions to submit to Mr. Chapman.

I have no money or effects of Mr. Gordon's estate, which is now being settled in California, the property being there, and is managed by Mr. Clark, the executor, who will attend to all such matters, I have no doubt.

Truly, yours,

GEORGE D. SNOW.

73 "Q."

In the probate court of the city and county of San Francisco, State of California.

Decree of distribution of estate.

IN THE MATTER OF THE ESTATE OF JOHN GORDON, DECEASED.

P. B. Clark, the executor of the last will and testament of John Gordon, deceased, having, on the 11th day of December, A. D. 1868, filed.

in this court his petition, setting forth, among other matters, that his accounts have been finally settled; that all the debts of said deceased and of said estate and the expenses and charges of administration have been paid; that a portion of said estate remains to be distributed to the residuary legatee of said deceased, and praying for an order of distribution of the residue of said estate among the persons entitled.

And this court, having thereupon, to wit, on the day aforesaid, made an order directing all persons interested in said estate to be and appear before this court, at the court-room thereof, on Monday, the 11th day of January, A. D. 1869, at eleven o'clock a. m., then and there to show cause why an order of distribution should not be made of the residue of said estate to the residuary legatee named in the last will and testament of said deceased according to law, and directing a copy of said order to show cause to be published for four successive weeks, before said eleventh day of January, A. D. 1869, in the San Fran-
74 cisco Daily Times, a newspaper printed and published in the city and county of San Francisco.

And at said hour on said 11th day of January, A. D. 1869, upon satisfactory proof of the due publication in said newspaper of said order to show cause, for four successive weeks before said eleventh day of January, A. D. 1869, as directed by this court, the said executor appearing by his counsel, E. B. Mastick, esq., and Geo. B. Merrill, esq., the attorney appointed to represent the minor heirs, being present, this court proceeded to the hearing of said petition; and the inventory and appraisement of said estate, the final accounts of said executor, the decree allowing and settling the same, and the decree of due publication of notice to creditors, together with other documentary and record proofs, were offered and put in evidence, and the said executor examined under oath, in open court; and it appearing to the satisfaction of this court, from said documentary and other proofs, and said examination of said executor, that the said P. B. Clark duly qualified as such executor on the 26th day of August, A. D. 1867, and thereupon entered upon the administration of said estate, and has ever since continued to administer the same.

That due and legal notice to creditors was published, and that a true inventory and appraisement of said estate were duly made and returned to this court.

75 That more than one year has elapsed since the appointment of said P. B. Clark as such executor, and more than ten months have expired since the first publication of said notice to creditors.

That on the sixth day of November, A. D. 1868, said executor filed his accounts, and that after due hearing and examination the same were finally settled.

That the said executor has fully accounted for all the estate that has come to his hands, and that the whole estate, so far as has been discovered, has been fully administered, and the residue thereof, consisting of the property hereinafter particularly described, is now ready for distribution.

That all the debts of said deceased, and of said estate, and all the expenses of the administration thereof thus far incurred, and all taxes that have attached to or accrued against the said estate, have been paid and discharged, and said estate is now in a condition to be closed.

That the residue of said estate is real and personal property.

That the said John Gordon died testate in the county of Le Sueur, State of Minnesota, on the 25th day of May, A. D. 1867, leaving him surviving numerous heirs, all residing without the State of California,

and named as legatees in the last will and testament of said deceased.

That the said George D. Snow is entitled to the residue
76 of said estate as per the terms of the last will and testament of said John Gordon, deceased.

Now, on this, the said eleventh day of January, A. D. 1869, on motion of E. B. Mastick, esq., counsel for said executor, the said George B. Merrill, esq., attorney for minor heirs, being present and consenting, no exceptions or objections being filed or made by any person interested in the said estate or otherwise, it is hereby ordered, adjudged, and decreed that all the acts and proceedings of said executor as reported to this court, and as appearing upon the records thereof, be, and the same are hereby, approved and confirmed, the residue of said estate of John Gordon, deceased, hereinafter particularly described, and now remaining in the hands of said executor, and any other property not now known or discovered, which may belong to the said estate, or in which the said estate may have any interest, be, and the same is hereby, distributed as follows, to wit: to the said George B. Snow, who is named in said last will and testament as residuary legatee.

And it is further ordered that the said P. B. Clark, executor as aforesaid, upon payment and delivery of the said residue, as hereinbefore ordered, and upon filing due and proper vouchers and receipts therefor, in this court, be fully and finally discharged from his trust as such executor.

The following is a particular description of said residue of said
77 estate, referred to in this decree, and of which distribution is ordered, adjudged, and decreed, as aforesaid, to wit:

REAL ESTATE.

That certain fifty vara lot, situate, lying, and being in the city and county of San Francisco, State of California, and known on the official map of said city as lot No. 5, in block 350, western addition.

PERSONAL PROPERTY.

The sum of thirty-eight hundred and seventy-nine $\frac{64}{100}$ dollars ($3,879. 64) cash in hand in United States gold coin; also, one certain promissory note, secured by mortgage on real estate, situate in the city and county of San Francisco, for four thousand dollars ($4,000) made by C. Reynolds, and which will not be due and payable before the 8th day of May, 1869.

It is further ordered that a certified copy of this decree be recorded in the office of the recorder of the city and county of San Francisco.

SELDON S. WRIGHT, *Probate Judge.*

(Written across the face:)

Recorded in the office of the county recorder of the city and county of San Francisco, January 15, 1869, at 11 min. past 12 m. Liber W., of miscellaneous page 220.

E. W. LEONARD, *County Recorder.*

Office of the county clerk of the city and county of San Francisco, ss:

I, Washington Bartlett, county clerk of the city and county of San Francisco, and *and* ex-officio clerk of the probate court thereof,
78 do hereby certify the foregoing to be a full, true, and correct copy of an order duly made and entered upon the minutes of the said court.

Witness my hand and the seal of said court this 12th day of January, A. D. 1869.

[SEAL.] WASHINGTON BARTLETT, *Clerk*,
By M. McNELLY, *Deputy Clerk*.

"R."

Final discharge of executor.

In probate court of the city and county of San Francisco, State of California.

IN THE MATTER OF THE ESTATE OF JOHN GORDON, DECEASED.

P. B. Clark, the executor of the last will and testament of John Gordon, deceased, having this day duly presented to this court satisfactory vouchers, showing that he has paid all sums of money due from him, and has delivered up, under the order of this court, all the property of said estate remaining in his hands to the party entitled, and in particular having produced the receipt and acknowledgment of George D. Snow, the residuary legatee, named as such in the last will and testament of said deceased, showing that he has paid over the money and delivered up the property of said estate in accordance with the directions of the decree of distribution made by this court on the eleventh day of January, A. D. 1869, to the residuary legatee of the last
79 will and testament of the said deceased, and the person entitled as named in said decree, and has complied in all respects with the terms of said decree, and that, as such executor, he has performed all the acts lawfully required of him, and certain documentary and other proofs having been offered, and the matter having been fully examined and considered by this court, and it having been shown that said estate has been fully administered, that no other property remains in the hands of said executor, and that no other acts remain to be performed by him:

Now, on motion of counsel for executor, it is ordered, adjudged, and decreed that said P. B. Clark, executor as aforesaid, has fully and faithfully discharged the duties of his trust; that he is hereby wholly and absolutely discharged from all further duties and responsibilities as such executor, and that his letters-testamentary are hereby vacated; that the said estate is declared fully distributed, and the trust settled and closed, and the said executor is hereby released from any liability to be hereafter incurred.

Dated January 12th, 1869.

SELDEN S. WRIGHT,
Probate Judge.

Office of the country clerk of the city and county of San Francisco, ss:

I, Washington Bartlett, county clerk of the city and county of
80 San Francisco, and ex-officio clerk of the probate court thereof, do hereby certify the foregoing to be a full, true, and correct copy of an order duly made and entered upon the minutes of said court.

Witness my hand and the seal of said court, this 12th day of January, A. D. 1869.

[SEAL.] WASHINGTON BARTLETT, *Clerk*,
By M. McNALLY, *Deputy Clerk*.

81 *Deposition referred to in annexed bill of exceptions.*

In the United States circuit court for the district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR OF EUNICE Chapman, deceased,
vs.
GEORGE D. SNOW AND P. B. CLARK, EXECUTORS of John Gordon.

Interrogatories to be propounded to the plaintiff, George M. Chapman, a witness in plaintiff's behalf.

1. Are you the plaintiff in this action?
2. What is your name, age, and place of residence?
3. Did you ever write any letters to the defendant George D. Snow; if so, how were they directed, and what did you do with them, and where are they if you know?
4. If you did write such letters, did you preserve copies thereof? If so, annex such copies to your deposition.
5. If you did not preserve copies, do you recollect the contents thereof? If you recollect the contents, state the contents of such letters,

82 or as many of them as you do recollect the contents of.

6. Did you receive answers to any of such letters; if so, to what ones, and what has become of such answers?
7. Do you know anything to the advantage of the plaintiff material to the issues herein? If so, state the same as fully as if particularly interrogated in reference thereto.

Sept., 1870.

R. B. GALUSHA, *Plaintiff's Attorney.*

U. S. circuit court, dist. of Minnesota.

GEORGE M. CHAPMAN, EX. OF EUNICE CHAPMAN, deceased,
vs.
GEORGE D. SNOW, IMPLEADED WITH P. B. CLARK, ex'rs of John Gordon, dec's'd.

Interrogatory to be administered to George M. Chapman, the above-named plaintiff, upon the taking of his deposition under the stipulation hereto annexed.

If, in answer to the fifth direct interrogatory, you say you do recollect the contents of the letters therein referred to, or of any of them, state the contents of each of said letters separately and in the language in which it was written, including its date. If you state that you

83 cannot repeat the language of said letters or either of them, then state how you know that the contents of said letters, as given in your answer to the said fifth interrogatory, is true, and are you prepared to say, and do you say, upon your oath, that the contents of said letters, as so given by you, are in every particular true, and that you have stated the whole of the contents of each and every of said letters. How many letters did you so write, and what was the date of each?

A. G. CHATFIELD,
Attorney for Def't Snow.

It is hereby stipulated between the plaintiff and defendant, George D. Snow, in the above-entitled action, that the deposition and testimony of the plaintiff therein, George M. Chapman, on the part of the plaintiff, may be taken before any clerk or commissioner of the United States circuit court for the southern district of New York, whose official character as such clerk or commissioner shall be sufficiently proven by an impression of the seal of the said circuit court affixed to and stamped upon his return hereto; and such clerk or commissioner is hereby agreed upon and appointed to take the deposition of said witness upon the foregoing interrogatories and cross-interrogatories; and said interrogatories and cross-interrogatories shall go out with this stipulation to be propounded to said witness, after such witness is produced and sworn to testify the truth, the whole truth, and nothing but the truth, relative to said action; and said parties hereby waive any and all ob-
84 jections to such clerk and commissioner, and waive the issuing of any commission from said court herein, and hereby agree that the deposition of said witness shall be taken, and have the same force and effect as if taken upon commission duly issued herein; and said parties hereby waive any and all notice and prerequisite forms required by law or rules of court for the taking of depositions; but said parties reserve to themselves the right to object to the competeney and admissibility of interrogatories and cross-interrogatory, or to any of them, and to any of the answers thereto, respectively, in like manner, and upon the same grounds, as if said witnesses were present and orally examined in open court upon the trial of this cause, which is at issue and pending in said court.

Dated Sept. 26, 1870.

A. G. CHATFIELD,
Att'y for Def't Snow.
R. B. GALUSHA,
Pl'ff's Att'y.

Deposition of George M. Chapman, a witness produced, sworn, and examined, the 14th day of October, in the year one thousand eight hundred and seventy, under and by virtue of a stipulation, annexed hereto, in a certain cause now pending and at issue between George M. Chapman, executor of Eunice Chapman, deceased, plaintiff, and George D. Snow and P. B. Clark, executors of John Gordon, defendant, said cause being in the United States circuit court for
85 the district of Minnesota, as follows:

GEORGE M. CHAPMAN, being duly sworn, pursuant to the instructions hereto annexed, deposes and says:

In answer to the first direct interrogatory, deponent saith that he is the plaintiff in this action.

In answer to the second direct interrogatory, deponent says that his name is George M. Chapman; that he is over fifty years of age, and his present residence is in Newark, in the State of New Jersey.

In answer to the third direct interrogatory, defendant saith that he did write letters to George D. Snow; that he directed said letters to George D. Snow, Le Sauer, Minnesota, and deposited them in the general post-office in the city of New York. The receipt of said letters was acknowledged by the said George D. Snow, and deponent believes them to be now in his possession.

In answer to the fourth direct interrogatory, deponent saith that he did preserve a copy of one of the said letters, which he now annexes to

this deposition, marked Schedule A; and deponent further says that after he had received the answer of said George D. Snow to his said letter marked A, which answer bore date the 20th November, 1867, he placed the matter in the hands of his agent and attorney, George
86 W. Paine, esq., of the city of New York, who continued the correspondence with the said George D. Snow, but deponent believes he did not keep copies of his said letters.

In answer to the fifth direct interrogatory, deponent saith that the said George W. Paine did write several letters as his agent to the said George D. Snow, between the months of November, A. D. 1867, and the month of January, 1868. All of the letters written by Mr. Paine were read and their contents fully known at the time by me. I do not recollect the number or the exact date of the letters, and cannot state the exact words used. The first of said letters was in answer to said Snow's letter to me, dated November 20, 1867, and informing him that we would get an exemplified copy of the judgment-rolls from King's County, with full copies of all the papers, and send him to file in the probate court, according to his request.

That we had an attachment pending in Kings County against the property of Mr. Brooks, which we thought would hold the property; that he could not expect us to go through an expensive litigation against Brooks when he had cash in hand more than sufficient to pay our claims, but suggested that on receiving our money from him we would transfer our claim to them, and use our good offices in their favor, so far as we could justly.

In one of said letters we requested him to hurry up the settlement of the estate, and as most of it was cash already in his hands, we
87 would make him a liberal discount if he would pay our claims at once, and not compel us to wait the time allowed by law for him to pay us.

In another of said letters we again pressed him for a settlement, and suggested that he might employ (or we would employ) another lawyer to aid him in realizing our claim, if he thought fit.

On the 11 Feb., 1868, the said George W. Paine, as deponent's attorney, wrote Mr. Snow another letter, and enclosed to him the exemplified copies of our judgment-rolls, in compliance with his request in his letter of Nov. 20, 1867, and received an answer thereto dated February 28, 1868.

And on the 18th March following, Mr. Paine wrote him another letter, informing him that the utmost limits allowed by law, as executor of the estate, had passed, and urging him to remit the amount due on our claim.

In answer to the sixth direct interrogatory, deponent saith that he did receive answers to the letters aforesaid. He received direct to himself an answer from said Snow, dated Nov. 20, 1867, to his letter marked Exhibit "A." He received, through his attorney, Geo. W. Paine, an answer dated Jan'y 9, 1868, from Geo. D. Snow, to the several letters written him between the 20th Nov., 1867, & Jan'y, 1868, and a letter dated Feb. 28, 1868, in answer to said Paine's letter of Feb. 11, 1868, and from J. H. Snow a letter dated March 26, 1868, in answer to said Paine's letter of March 19, 1868; said answers were sent by me to my attorney, R. B. Galusha, at Saint Paul, Minn., and I believe they are now in his hands.

88 In answer to the seventh direct interrogatory, deponent says that he has nothing further to state in answer to this interrogatory.

In answer to the cross-interrogatory of A. G. Chatfield, attorney for the defendant, Snow, deponent saith that he hath before fully answered the same, except as follows, viz: "Are you prepared to say, and do you say, upon your oath, that the contents of said letters, as given by you, are in every particular true, and that you have stated the whole of the contents of each and every of said letters?"

Deponent further says that the contents of said letters, as given by me, I believe to be true in every particular, but I have not stated the whole of the contents of each and every of said letters, but have stated the most material parts thereof, as I recollect them, after so long a lapse of time, and all that I remember thereof.

EXHIBIT A.

NEW YORK, *October* 23*d*, 1867.

GEORGE D. SNOW, Esq.,
Le Sueur, Minn.:

DEAR SIR: Above I hand you a letter of introduction from our mutual friends, the Bradstreets.

I also enclose you transcript of the following judgment, ob-
89 tained by me as executor of my mother, in the supreme court of Kings County, N. Y.

GEO. W. CHAPMAN, EXECUTOR OF EUNICE Chapman, deceased, *ag'st* JOHN W. BROOKS, JOHN GORDON, AND James Root.	Jan'y 4, 1864. Damage & costs. $4,759.80.

We are informed that the said John Gordon died in your county, in May last, and left $34,000 cash, lent out in California, and other property, and in his will appointed P. B. Clark, of San Francisco, and yourself as his executors, and that the money is now in your hands as executors. We therefore enclose you the transcript of judgment to prove our claim upon said estate, and, if further proof is necessary under your laws, you will please inform us by return mail what steps, if any, are necessary for us to take to recover the money.

Trusting to your kindness and good offices in our behalf,
I remain yours,

G. M. CHAPMAN.

Address box 1782, post-office, New York.

Please answer by return mail. I find I have another judgment against the same parties, docketed May 19, 1864, for $61.64. Will send the proof as soon as I hear from you.

Exhibit A. K. G. W., U. S. Com.

90 I. Kenneth G. White, U. S. commissioner, duly appointed by the circuit court of the United States for the southern district of New York, do hereby certify that the foregoing testimony of George M. Chapman was taken before me on the 14th day of September, A. D. 1870, under and by virtue of the stipulation hereto annexed, and that the same was taken in answer to the annexed interrogatories and cross-interrogatory, and the said testimony was reduced to writing by the deponent, and was signed by him in my presence; and I further certify that the deponent was duly sworn by me to testify the truth, the whole

truth, and nothing but the truth, relating to the cause for which the deposition was taken, and the testimony was carefully read by the witness before subscribing the same, and he subscribed the same in my presence.

In testimony whereof I have hereunto set my name and affixed my seal this 14th day of September, 1870.

{ U. S. COMMISSIONER SEAL. }

KENNETH G. WHITE,
U. S. Commissioner for Southern District, New York.

[Five-cent revenue stamp, cancelled.]

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, second circuit,
91 do hereby certify that I am well acquainted with the handwriting of Kenneth G. White, whose name is subscribed to the annexed deposition certificate, and that the signature to the same is in his proper handwriting. And I do further certify that he was at the time of signing the same a United States commissioner, duly appointed by the circuit court of the United States of America for the southern district of New York, second circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, the 14th day of October, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of these United States

{ SEAL OF CIR'T COURT SO. DIST. N. Y. }

[illegible] ninety-fifth.

KENNETH G. WHITE, *Clerk.*

[5-cent revenue stamp cancelled.]

Court-fees, $10.

92 And afterwards, to wit, on the 19th day of April, A. D. 1872, the costs in said action were duly taxed by the clerk of said court, on due notice, at the sum of sixty-two dollars and seventy cents, and on the same day judgment was duly rendered and entered in said action in the words and figures following, viz:

United States circuit court, district of Minnesota.

GEORGE M. CHAPMAN, EXECUTOR OF THE LAST will and testament of Eunice Chapman, deceased,

vs.

GEORGE D. SNOW, IMPLEADED WITH P. B. Clark, as executors of the last will and testament of John Gordon, deceased.

This cause having been tried before the court without a jury, pursuant to stipulation of the parties thereto, at the June term thereof, 1871, and the same having been held under advisement by the court, and the court having filed its opinion thereon, on the 10th day of July, A. D.

1871, wherein and whereby it was ordered and directed that judgment be entered in favor of the plaintiff against the defendant, George D. Snow, for the sum of $7,264.25 with costs, and the court, on application of said defendant, having granted a stay of proceedings for thirty days, and *and* said time having expired, and the clerk having taxed the plaintiff's costs at the sum of $62.76;

Thereupon, upon motion of plaintiff's attorneys, it is considered and adjudged that the plaintiff do have and recover of and from the defendant, George D. Snow, impleaded as aforesaid, the sum of seven
93 thousand six hundred and forty-eight dollars and thirty-three cents, being the amount for which judgment was so directed to be entered, with interest to the date of the entry hereof; besides his costs and disbursements by him in and about his suit in this behalf expended, taxed at sixty-two dollars and seventy cents, and that the plaintiff have execution therefor.

Judgment record signed this 19th day of April, A. D. 1872.

H. E. MANN, *Clerk.*

And afterwards, to wit, on the 26th day of October, A. D. 1872, the said defendant Geo. D. Snow, by his said attorney, filed in the clerk's office said court his bond, on appeal to the Supreme Court of the United States, which bond is endorsed by the Hon. R. R. Nelson, one of the judges of said circuit court, in the words and figures following, to wit:

I hereby approve the within bond, and accept the same.

R. R. NELSON, *Judge.*

And on the same day a writ of error was duly issued which is hereto attached, and a copy hereof deposited in the clerk's office of said circuit court, for the plaintiff.

94 UNITED STATES OF AMERICA:

Circuit court of the United States for the district of Minnesota, ss:

I, H. E. Mann, clerk of the said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing is a true and complete transcript of the record, process, pleadings, orders, final judgment, bill of exceptions, and all other proceedings in said cause, as appears from the original files and records of said court; and I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith, the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, at Saint Paul, in the district aforesaid, this 23d day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh year.

[SEAL.] H. E. MANN, *Clerk.*

(Indorsement on cover:) No. 418. George D. Snow, impleaded with P. B. Clark as ex'or of Jno. Gordon, dec'd, plaintiff in error, vs. George W. Chapman, ex'or of Eunice Chapman, dec'd. Minnesota, C. C. U. S. Filed 28th March, 1873.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 6.

EDWIN R. SMITH, as Executor of GEORGE D. SNOW, impleaded with P. B. CLARK, as Executor of JOHN GORDON, Deceased,

Plaintiff in Error,

against

GEORGE W. CHAPMAN, Executor of EUNICE CHAPMAN, Deceased,

Defendant in Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR.

W. P. CLOUGH,
Of Counsel for Plaintiff in Error.

Ramaley & Cunningham, Printers, St. Paul.

IN THE SUPREME COURT

OF THE

UNITED STATES.

EDWIN R. SMITH, as executor of GEORGE D. SNOW, impleaded with P. B. CLARK, as executor of JOHN GORDON, deceased,

Plaintiff in Error.

against

GEORGE W. CHAPMAN, executor of EUNICE CHAPMAN, deceased,

Defendant in Error.

STATEMENT OF THE CASE.

This was an action at law commenced in the Circuit Court of the United States for the District of Minnesota, by the defendant in error against the plaintiff in error, on January 7, 1869.

The pleadings were framed in the forms prescribed by the laws of the State of Minnesota, for pleadings in like cases in the courts of record of that State, in pursuance of a rule of the Court below, adopted on August 7, 1866, in the following words:

ORDERED, That in actions at law, the practice and pleadings now existing in the District Courts of the State of Min-

nesota, be and same are hereby adopted in this Court, except so far as the same may be contrary to the Constitution and laws of the United States; except, also, that all original and final process shall be issued by the clerk of this Court, under the seal thereof, and be executed by the Marshal, as heretofore.

The practice and pleadings then existing in the district courts of the State of Minnesota, (which are the courts of general original jurisdiction of that State,) were regulated by the statutes of that State.

The statutes referred to are codified as chap. 66 of the General Statutes of Minnesota, which took effect on August 1, 1866, and, in so far as they have any bearing upon questions likely to arise in this case, are in the following terms:

SEC. 71. The only pleadings on the part of the plaintiff are: *First.* The Complaint. *Second.* The Demurrer or Reply.

And on the part of the defendant: *First.* Demurrer. *Second.* The Answer.

SEC. 73. The complaint shall contain:

First. The title of the cause, specifying the court in which the action is brought; the county in which the action is brought; and the names of the parties to the action, plaintiff and defendant;

Second. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

Third. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount thereof shall be stated.

SEC. 79. The answer of the defendant shall contain:

First. A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

Second. A statement of any new matter constituting a defence or counterclaim, in ordinary and concise language, without repetition.

* * * * * * *

SEC. 81. The defendant may set forth by answer as many defences and counterclaims as he has; they shall each be

separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

* * * * * * *

Gen. Stats. of Minn., pp. 459-460.

The complaint sets forth the following matters:

1. The citizenship of the parties.

2. That the plaintiff is the executor of the last will of one Eunice Chapman, deceased; but whether such will was ever proven, or whether letters testamentary thereon were ever issued to the plaintiff by any court having jurisdiction to issue the same, is not stated.

3. That on January 4, A. D. 1864, the plaintiff, as executor of the will of Eunice Chapman, recovered a judgment in the supreme court of the State of New York, against John Gordon, impleaded with two other persons, for the sum of four thousand seven hundred fifty-nine dollars and eighty cents ($4,759.80), which judgment remains wholly unsatisfied.

4. That after the recovery of such judgment, and before the commencement of this action, John Gordon died, leaving a last will, in which George D. Snow and P. B. Clark were named as executors.

5. That after the death of Gordon, and before the commencement of this action, Snow and Clark were duly appointed the executors of the will of Gordon, and duly qualified as such, and at the time of the commencement of this action were the executors of such will.

6. That the court in which the said judgment was recovered was, at the time of the recovery thereof, a court of general jurisdiction; and that the summons in the action wherein such judgment was recovered, was personally served on John Gordon.

See printed record, pp. 2-3.

The answer contains the following matters:

1. All the allegations of the complaint are put in issue, except those stating the citizenship of the parties; the death of John Gordon; and the leaving by him of a will, in which Snow and Clark were named as executors.

2. It is specifically denied that Snow ever qualified as executor of Gordon's will; or that he ever acted as such executor; or that he ever became such executor.

3. It is stated that no property left by John Gordon ever came to Snow's hands.

4. It is stated that the property left by John Gordon was almost wholly situated in the State of California, where Clark resided; that Clark alone had proven the will and qualified as executor in California, and that the estate had been fully administered by Clark in that State.

See printed record, pp. 5–6.

Clark has never been served with process in this action, and has never appeared therein.

Trial by jury was duly waived, and the issues raised by the pleadings were tried by the court without a jury.

See printed record, p. 7.

A general finding in favor of the plaintiff, directing judgment to be entered against the defendant for the amount claimed by the plaintiff, was made by the court.

See printed record, p. 7.

A bill of exceptions was tendered by the defendant, which was allowed, signed, and sealed by the learned judge before whom the case was tried.

See printed record, pp. 8–14.

The questions of law in the case all arise upon rulings made by the court in the course of the trial, and upon the form of the judgment entered.

ASSIGNMENT OF ERRORS.

First.—In the course of the trial, the plaintiff, in order to show himself to be the executor of the last will of Eunice Chapman, deceased, and in order to show his authority to maintain this action, offered in evidence a duly certified copy of the record of the last will of the said Eunice Chapman, and of letters testamentary therein, issued to him.

The said certified copy of record was from the surrogate's court, in and for the county of Kings, and State of New York.

To the admission of the said certified copy of the said record in evidence, the defendant, by his counsel, objected, on the ground that the same was not competent to prove that the plaintiff was executor of the last will of Eunice Chapman, as alleged by the plaintiff in his complaint. And the defendant, by his counsel ,insisted, that to authorize the plaintiff to bring or maintain, as executor of the will of Eunice Chapman, an action in the State of Minnesota, he must establish the fact of his being such executor, by the proceedings and records required by the statutes of the State of Minnesota permitting an executor appointed in another State or country to commence and prosecute, in his capacity of executor, an action in the Courts of the State of Minnesota.

But the Court then and there decided that the said objection was not well taken, and overruled the same, and admitted the said copy of record in evidence.

To this decision of the Court, the defendant, by his counsel, then and there duly excepted.

See printed record, p. 8.

This ruling of the court below the plaintiff in error assigns for error, on account of which he prays that the judgment of the Court be reversed, and a new trial granted.

Second.—In the course of the trial, the plaintiff, in order to prove the judgment declared on in his complaint, offered

in evidence an exemplification of certain Court records, in an action in the supreme court of the State of New York, in and for the county of Kings, commenced by Eunice Chapman against James W. Brooks, John Gordon, and James Root.

A copy of the said exemplification is attached to the bill of exceptions as Exhibit "A," and is found pp. 14—19 of the printed record.

The said exemplification is composed of copies of the following named papers:—

1. The summons in the action.

2. The complaint in the action.

3. The answer of the defendants in the action.

4. A statement of the evidence in the action.

(As the evidence adduced on the trial of that action is wholly unimportant in this case, it was omitted in making up the bill of exceptions.)

5. A statement of the verdict.

6. An order at special term overruling a motion on the part of the defendants for a new trial.

7. Notice of appeal from the last named order to the general term of the same Court.

8. A statement in these words:

On the 4th day of January, 1864, judgment was entered against the defendants for $4,759.80, and the defendants, Brooks and Gordon, thereafter duly appealed therefrom, and served notice of appeal as follows.

See printed record p. 18.

9. Notice of appeal from judgment to general term of same Court.

10. A copy of Court minutes in the following words:

SUPREME COURT.

At a general term of the Supreme Court, held for the State of New York, at Poughkeepsie, in the county of Dutchess, on the 12th day of May, A. D. 1864.

Present:—Hon. John W. Brown, John A. Lott, Wm. W. Scrugham, Jos. F. Barnard, Justices.

GEORGE M. CHAPMAN, Executor, &c.

against

JOHN W. BROOKS AND OTHERS.

Judgment and order refusing a new trial affirmed with costs.

[U. S. rev. stamp 5c., cancelled.]

Opinion by Justice Brown.

Copy decision.

W. B. SHELDON, *Clerk.*

See printed record, p. 18.

11. Judgment of affirmance and for recovery of costs on appeal, in the following terms:—

SUPREME COURT.

GEORGE M. CHAPMAN, Executor of Eunice Chapman, deceased, *Plaintiff and Respondent,*

against

JOHN W. BROOKS and JOHN GORDON, impleaded with JAMES ROOT, *Defendant and Appellant.*

Judgment of affirmance on appeal, May 19th, 1864.

This action having been brought to a hearing upon an appeal of the defendants, John W. Brooks and John Gordon, from a judgment entered herein, in the office of the clerk of Kings County, on the 4th day of January, A. D. 1864, in favor of the above named plaintiff, and against the said John W. Brooks and John Gordon and James Root, for the sum of four thousand seven hundred and fifty nine dollars and eighty cents, and also upon an appeal of the said defendants, Brooks and Gordon, from the order of the special term of this Court, denying the motion for a new trial, made on behalf said defendants, Brooks and Gordon, and entered on the 21st day of December, 1863, in said Clerk's office, and the decision of the Court upon the said appeals having been

filed, whereby the aforesaid judgment and order refusing a new trial are, in all things affirmed with costs.

Now, on motion of George W. Paine, attorney for said plaintiff and respondent, it is adjudged that said judgment and the said order be, and the same are hereby in all things affirmed; and that said George M. Chapman, executor of Eunice Chapman, deceased, plaintiff and respondent, recover of John W. Brooks and John Gordon, the said defendants and appellants, the sum of sixty-one 64-100 dollars, costs and disbursements on said appeal.

J. N. STEARNS,
Clerk of Kings County.

See printed record, pp. 18—19.

The defendant in this action, by his counsel, objected to the admission in evidence of the said exemplification, on the grounds following, among others: Because the said exemplification does not contain any proper evidence of any such judgment as that described in the complaint. It states only in general descriptive terms that such a judgment was entered; but how, or when, or where, is not stated, It does not contain a copy of the record of the judgment; and such a record, or a properly proven copy thereof, is the only competent evidence of the existence of the judgment. The statement in the exemplification, that judgment was rendered, is mere hearsay that judgment exists, but is not evidence of its terms or contents.

But the Court thereupon decided that the said objections of the defendant to the admission in evidence of the said exemplification were not, nor were any of them, well taken; and admitted the said exemplification in evidence; and decided the same to be competent and sufficient evidenee to establish the existence of the judgment in favor of the plaintiff, and against the said John Gordon, alleged in the complaint.

To this ruling of the Court, the defendent, by his counsel, duly excepted.

See printed record, pp. 8–9.

This ruling of the Court, the plaintiff in error assigns for error, on account of which he prays that the judgment of the Court below be reversed, and a new trial granted.

Third.—In the course of the trial the plaintiff, in order to prove the defendant to be the executor of the last will of said John Gordon, offered in evidence an exemplification of the record, in the probate court for the County of Le Sueur and State of Minnesota, of letters testamentatory upon the will of John Gordon, running to George D. Snow and Pomeroy B. Clark, as executors. The said exemplification was in words and figures as follows :

STATE OF MINNESOTA, } ss.
County of Le Sueur. }

At a regular term of the Probate Court, held at Le Sueur city, in and for said County of Le Sueur and State of Minnesota, on the 1st day of July, A. D. 1867.

IN THE MATTER OF THE ESTATE OF JOHN GORDON, late of Le Sueur, in said Le Sueur County.

Whereas, John Gordon, late of the town of Le Sueur, county of Le Sueur, and State of Minnesota, made in his life time his last will and testament, and which, at a term of our said Court, held on the 1st day of July, A. D. 1867, at the office of the Judge of Probate, was proved, and a decree of probate granted and admitted to record in said court, and probate granted to George D. Snow and Pomeroy B. Clark, the executors thereof and therein appointed, and that George D. Snow and Pomeroy B. Clark having complied with the provisions of the statutes in such cases made and provided ; therefore, to the intent that the said will may be well and truly performed, we do give, grant, and covenant unto the said George D. Snow and Pomeroy B. Clark, the administration of all and singular the goods, chattels, rights, credits, and estate aforesaid, and do hereby grant unto you, the said George D. Snow and Pomeroy B. Clark, full power and authority to administer all and singular the credits and estate of said deceased, which to him, while he lived, at the time of his death did appertain, and well and truly to dispose of according to law ; also, to demand, collect, recover, and receive, the rights and credits of said deceased, and pay all debts in which he stood bound, so far as the credits and estate aforesaid will enable you to do, and having accepted said trust, you will make, or cause to be made, a true and perfect inventory of all and singular the credits of said deceased, and the same to return, or cause to be returned, to the Probate Court

of the county aforesaid, on or before the first day of October, A. D. 1867, and also to return, or cause to be returned, to the said Court a true and just account of your administration in the premises, on or before the 1st day of July, A. D. 1867.

Given under my hand and official seal, this 1st day of July, A. D. 1867.

WM. BACON,

[SEAL.] *Judge of Probate.*

IN PROBATE COURT.

Special Term.

STATE OF MINNESOTA, } ss.
County of Le Sueur. }

I, Edward Harty, judge of the Probate Court of said county, do hereby certify that I have compared the annexed copy of letters testamentary in matter of the estate of John Gordon, deceased, with the original records preserved in said probate registry, and that the same is a true copy thereof, and of the whole of said original records.

In testimony whereof, I have hereunto sub——— my name, and affixed the seal of the Probate Court of said county, at Le Sueur, in said county, this 17th day of February, A. D. 1870.

EDWARD HARTY,

Judge of Probate of Le Sueur County, Minn.

See printed record, pp. 24–25.

To the admission in evidence of the said exemplification, the defendant, by his counsel, then and there objected, on the ground that such letters could not issue until the bond required by the statutes of the State of Minnesota, to be given by executors, had been given, nor until the defendant and the said Clark, or one of them, had accepted the trust; that it did not appear that Snow had ever accepted the trust or given the bond, or that such letters had ever been delivered to him; that the giving of the bond and the acceptance of the trust, being by the statutes of the State pre-requisites to the issuance of letters testamentary, they are jurisdictional and must be proven by the record thereof or by the production of the bond itself. But the Court then and there gave its opinion, and decided that the said objections to the

admission in evidence of the said exemplification were not well taken, and overruled the same; and to the said opinion and decision of the Court, the defendant, by his counsel, did then and there except.

See printed record, p. 10.

This ruling of the Court the plaintiff in error assigns for error, on account of which he prays that the judgment of the Court below be dismissed and a new trial granted.

Fourth.—In the course of the trial, the plaintiff, to further maintain the issues on his part, offered to read in evidence a written deposition of the plaintiff, a copy of which is contained in the printed record, *pp.* 34–36, and therewith offered to read in evidence a certain letter dated October 30, 1867, written by George D. Snow to George M. Chapman, a copy of which is contained in the printed record on pp. 25–26; marked "E;" also, a certain other letter, dated November 20, 1867, written by George D. Snow to George M. Chapman, a copy of which is contained in the printed record on p. 26, marked "F;" also, a certain other letter, dated June 9, 1868, written by George D. Snow to George W. Paine, contained in the printed record on p. 26, marked "G;" also, a certain other letter, dated February 20, 1868, written by George D. Snow to George W. Paine, contained in the printed record on p. 27, marked "H;" also, two certain other letters, dated October 23, 1867, one written by J. M. Bradstreet and sent to George D. Snow, and the other written by G. M. Chapman to George D. Snow, contained in the printed record on p. 27, marked "I."

To the admission in evidence of the said deposition and the said letters, the defendant objected, on the ground, among others, that the contents of the said letters, and of said deposition, are wholly immaterial to any issue raised by the pleadings in this case.

The Court overruled the objection, and received the said deposition, and all the said letters, in evidence.

The defendant, by his counsel, thereupon duly excepted to such ruling of the Court.

See printed record, p. 11.

This ruling of the Court the plaintiff in error assigns for error, on account of which he prays that the judgment of the Court below be reversed: and a new trial granted.

Fifth.—In the course of the trial, the plaintiff, to maintain the issues on his part, offered to read in evidence the following described letters:

A letter without date, writen by R. B. Galusha to George D. Snow, contained in the printed record on pp. 27–28, marked "J;" another letter dated December 5, 1868, written by R. B. Galusha to George D. Snow, contained in the printed record, on p. 28, marked "K;" another letter dated December 11, 1868, written by R. B. Galusha to George D. Snow, contained in the printed record on p. 28, marked "L;" another letter dated December 30, 1868, written by R. B. Galusha to George D. Snow, contained in the printed record on pp. 28–29, marked "M;" another letter dated November 20, 1868, written by George D. Snow to R. B. Galusha, contained in the printed record on p. 29, marked "N;" another letter dated December 10, 1868, written by George D. Snow to R. B. Galusha, contained the printed record on p. 29, marked "O;" another letter dated January 7, 1869, written by George D. Snow to R. B. Galusha, contained in the printed record on p. 29, marked "P."

The defendant, by his counsel, objected to the admission in evidence of any of said letters, on the grounds that the same are immaterial to any issue in this case.

But the Court then and there overruled the said objection, and received the said letters in evidence, to which ruling the defendant, by his counsel, then and there excepted.

See printed record, p. 11.

This ruling of the Court the plaintiff in error assigns for

error, on account of which he prays that the judgment of the Court below may be reversed, and a new trial granted.

Sixth.—The plaintiff, in the course of the trial, to make out his cause of action, called as a witness in his behalf R. B. Galusha, who being sworn, testified in substance as follows:

I have had several conversations with the defendant. The first one was about the time when I brought this suit, in January, 1869. It was at Le Sueur; and, I think, after the commencement of this suit. He then said the estate of John Gordon, deceased, had been administered in California; that the plaintiff's claim was an unjust one; and that he had taken the course that he had to delay the proceedings here until the estate was administered in California. He said that his action had been influenced by the fact that he regarded the claim as an unjust one, and that he thought he could defeat it by doing as he did. He expressed a doubt whether the estate would pay all the legacies. He said his wife had received her legacy, or a part of it.

See printed record, p. 12.

The defendant, by his counsel, objected to the admission of the testimony of this witness, on the ground that it was immaterial to any issue in the case.

But the Court overruled the objection, and received the testimony of the witness in evidence, to which ruling the defendant by his counsel then and there duly excepted.

This ruling of the Court, the plaintiff in error assigns for error, on account of which he prays that the judgment of the Court below may be reversed, and a new trial granted.

See printed record, p. 12.

Seventh.—In order to prove his case, the plaintiff introduced the following evidence, and then rested.

1. A certified copy of a record in the surrogate's court in and for the County of Kings and State of New York, of the last will of Eunice Chapman, and of letters testamentary thereon running to the plaintiff; such certified copy being

from said surrogate's court, and the same one referred to in the first assignment of error herein.

2. An exemplification of certain records of the supreme court of the State of New York, in and for the County of Kings, in an action commenced therein by Eunice Chapman against James W. Brooks, John Gordon, and James Root.

A copy of said exemplification appears in the printed record on pp. 14–19, marked "A."

Said exemplification is the same one referred to in the second assignment of error herein.

3. A certified copy of the record of an order of the probate court in and for the County of Le Sueur, and State of Minnesota, for the hearing of the proof of the will of John Gordon. A copy of the said certified copy is contained in the printed record, pp. 19–20, marked "B."

4. A certified copy of the record of the will of John Gordon, in the probate court, in and for the County of Le Sueur and State of Minnesota, and of a decree of such Court allowing and establishing such will.

A copy of said certificate copy is contained in the printed record, on pp. 20—24, marked "C."

5. A certified copy of a record in the probate court for the County of Le Sueur and State of Minnesota, of letters testamentary on the will of John Gordon, running to P. B. Clark and George D. Snow.

A copy of said certified copy is contained in the printed record, on *pp.* 20–24, marked "D."

The said certified copy is the same one referred to in the third assignment of error herein.

5. The written deposition of George M. Chapman.

A copy of said deposition is contained in the printed record, on pp. 33–7.

Said deposition relates wholly to correspondence between the plaintiff and the defendant about the plaintiff's claim against the estate of Gordon.

Together with said deposition, the following described letters :

A letter dated October 30, 1867, from George D. Snow to George M. Chapman.

A copy of this letter is contained in the printed record, on pp. 25–26, marked "E."

A letter dated November 20, 1867, from George D. Snow to G. M. Chapman.

A copy of this letter is contained in the printed paper-book on p. 26, marked "F."

A letter dated June 9, 1868, from George D. Snow to George W. Paine.

A copy of this letter is contained in the printed record, on p. 26, marked "G."

A letter dated February 20, 1868, from George D. Snow to George W. Paine.

A copy of this letter is contained in the printed record on p. 27, marked "H."

The said deposition and letters are the same referred to in the fourth assignment of error herein.

6. The following described letters :

A letter dated October 23, 1867, from J. M. Bradstreet & Son to George D. Snow.

A letter of the same date from G. M. Chapman to George D. Snow.

Copies of the said letters are contained in the printed record, on p. 27, marked "I."

A letter without date from R. B. Galusha to George D. Snow.

A copy of this letter is contained in the printed record on pp. 27–8, marked "J."

A letter dated December 5, 1868,, from R. B. Galusha to George D. Snow.

A copy of this letter is contained in the printed record, on p. 28, marked "K."

A letter dated December 11, 1868, from R. B. Galusha to George D. Snow.

A copy of this letter is contained in the printed record on p. 28, marked "L."

A letter dated December 30, 1868, from R. B. Galusha to George D. Snow.

A copy of this letter is contained in the printed record, on pp. 28–29, marked "M."

A letter dated November 20, 1860, from George D. Snow to R. B. Galusha.

A copy of this letter is contained in the printed record on p. 29, marked "N."

A letter dated December 10, 1868, from George D. Snow to R. B. Galusha.

A copy of this letter is found in the printed record on p. 29, marked "O."

A letter dated January 1, 1869, from George D. Snow to R. B. Galusha.

A copy of this letter is contained in the printed record, on p. 29, marked "P."

The said letters are the same ones referred to in the fifth assignment of error herein.

7. The testimony of one of the plaintiff's counsel, R. B. Galusha.

The said testimony is contained in the printed record, on p. 12.

The said testimony is the same referred to in the sixth assignment of error herein.

After the plaintiff had introduced the above stated matters in evidence, and thereupon rested his case, the defendant, by his counsel, in pursuance of the practice in the District Courts of the State of Minnesota, moved the court that the action be dismissed, upon the grounds following, among others:

1. That the plaintiff had failed to make a case, or to show a cause of action against the defendant, either by pleadings or proofs.

2. That the plaintiff had not proven the capacity of executor in which he sues, by any competent evidence; that is to say, by letters testamentary issued in the state of Minnesota, or by authority acquired under the statutes of the State of Minnesota, to sue as such executor.

3. That the judgment mentioned in the record offered and received in evidence differs from that described in the complaint.

But the Court decided and gave its opinion that the defendant's motion to dismiss was not well founded, and overruled the same. To this ruling the defendant by his counsel excepted.

See printed record, p. 12.

This ruling of the Court the plaintiff in error assigns for error, or account of which he prays that the judgment of the Court below be reversed, and a new trial granted.

Eighth.—Judgment in the action was rendered in the following form:

UNITED STATES CIRCUIT COURT, DISTRICT OF MINNESOTA.

GEORGE M. CHAPMAN, Executor of the last will and testament of Eunice Chapman, deceased,

against

GEORGE D. SNOW, impleaded with P. B. CLARK, as executors of the last will and testament of John Gordon, deceased.

This cause having been tried before the court without a jury, pursuant to a stipulation of the parties thereto, at the June term thereof, 1871, and the same having been held under advertisement by the Court; and the Court having filed its opinion thereon, on the 10th day of July, A. D. 1871, wherein and whereby it was ordered and directed that judgment be entered in favor of the plaintiff, against the defendant, George D. Snow, for the sum of $7,264.25, with costs, and the Court, on application of said defendant, having granted a stay of proceedings for thirty days, and said time having expired; and the clerk having taxed the plaintiff's costs at the sum of $62.76.

Thereupon, upon motion of plaintiff's attorneys, it is considered and adjudged, that the plaintiff do have and recover of and from the defendant, George D. Snow, impleaded, as aforesaid, the sum of seven thousand six hundred and forty-eight dollars and thirty-three cents, being the amount for which judgment was so directed to be entered, with interest to the date of the entry thereof; besides his costs and disbursements by him in and about his suit in this behalf expended, taxed at sixty-two dollars and seventy cents, and that the plaintiff have execution therefor.

Judgment record signed this 19th day of April, A. D. 1872.

H. E. MANN,
Clerk.

See printed record, pp. 37–38.

The said judgment is erroneous in form and substance, in these, among other things:—

1. The said judgment is against the said George D. Snow in his individual capacity; and is leviable out of his proper goods and chattels; whereas, if any judgment whatever were rendered against him in this action, such judgment should have been against him, at least as to the damages, solely in the capacity of executor of the last will of John Gordon; and should have contained a direction that the amount adjudged in favor of the plaintiff, at least as to the damages, be paid out of the estate of John Gordon, in the hands of Snow, in the course of the administration of Gordon's estate, which, if Snow were executor, was, at the time of the commencement of the action, and at the time of the rendition of the judgment, going on under the authority and control of another tribunal, that is to say, the probate court for Le Sueur county.

2. If by process issued out of the Court below in this action, the estate of John Gordon could be seized for the payment of the plaintiff's claim, then the judgment is wholly erroneous, because the answer sets up the defence of no assets in Snow's hands, and the court made no finding that the said Snow ever had any assets in his hands.

For these errors in the form and substance of the judgment, the plaintiff in error prays that the judgment may be reversed, and a new trial granted.

POINTS AND AUTHORITIES.

The matters assigned for error will be considered in the order in which they have been stated.

I.

The certified copy of letters testamentary from a surrogate's court of the State of New York, which was offered in evidence by the plaintiff to establish his title to maintain this action in the capacity of Executor of Eunice Chapman's will, was not evidence of such title, and should have been excluded.

As a general principle of law, letters-testamentary issued to a person by a court of one State will not authorize such person to bring suit for the recovery of the effects of the deceased in the courts of another State.

Each State, however, is left to determine for itself how far foreign executors shall be permitted, within its own jurisdiction, to assert authority over the estates of their testators.

A State may permit foreign executors to come within its jurisdiction, and possess themselves of the estates of their testators therein situated; and even to sue in its courts to reduce such estates to their possession.

But it is universally regarded that no rights within any given State are conceded to foreign executors, unless such concession be made by express legislative declaration.

Since a foreign executor has no rights within any given State, except such as that State expressly concedes to him; it follows that the concession may be upon terms; and further, that if it be on terms, the foreign executor must bring himself within them, or he will not be entitled to avail himself of the concession.

For example, if a State enact that foreign executors may, upon the doing of certain things, sue in its courts, the doing of such things by the foreign executor is necessary to confer upon him any right whatever to sue in the courts of such State.

The State of Minnesota has passed a statute defining the rights of foreign executors and administrators in the courts within that State.

Section 6, of chapter 67, of the General Statutes of Minnesota, is in the following terms:

SEC. 6. Any administrator or executor duly appointed in any other State or country, may commence and prosecute any action in any court of this State, in his capacity of executor or administrator, in like manner and under like restrictions as a resident may do; *provided*, that before commencing any action, an authenticated copy of his appointment as such executor or administrator is filed in the probate court of the county in which such action is to be commenced.

Gen. Stats. of Minn., p. 546.

The right to sue conferred by this statute is not absolute; it is merely conditional.

And the condition imposed is a *precedent* one; because it is to be performed before the suit is begun.

Williams's Saunders; Note to Pordage vs. Cole.

Duly authenticated letters must be filed in the proper probate court, or the foreign executor or administrator, as the case may be, is without any standing whatever in the courts within the State of Minnesota.

The condition prescribed by the statute is as binding upon the federal courts sitting within the State, as upon the courts of the State itself; for, in entertaining ordinary suits brought by executors to reduce to possession the estates of their testators, the federal courts are merely administering the laws of the State wherein they sit.

But it may be said that from the nature of the condition, it cannot be performed when the suit is brought in a federal court, and, that therefore, it has no force in relation to suits in such a court.

The answer to any such argument, if advanced, would be: the condition can be *substantially*, if indeed it cannot be *literally*, performed when the action is brought in a federal court.

All the purposes of the condition can be accomplished, when the suit is brought in a federal court, by the filing of authenticated letters in any probate court within the district; for the purpose of the condition undoubtedly was, to confer upon some probate court of the State jurisdiction to interfere, if necessary, and control the action of the foreign executor, as it might do that of a domestic executor under like circumstances.

This suit is brought by the plaintiff in a representative capacity solely: in the character of executor of Eunice Chapman's will.

The defendant, as he was at liberty to do, has put the plaintiff's allegation as to his representative character in issue, in accordance with the rules of pleading which were in force in the court where the suit was brought.

Consequently, the plaintiff was bound to affirmatively establish his right to sue as executor of Eunice Chapman's will, in the courts sitting within the State of Minnesota, for the recovery of moneys belonging to her estate.

The plaintiff could make out such right only by producing letters testamentary issued by the proper probate court of that State, or by producing proof that he had prior, to the commencement of the action, deposited in some probate court of that State, a duly authenticated copy of the letters issued to him by the surrogate's court of the State of New York.

It was not, upon the trial, pretended, either that letters had been issued to the plaintiff in this State, or that he had ever complied with the condition of the statute above quoted.

The plaintiff relied solely upon the production of the foreign letters to make out his right to maintain this suit; but such letters did not make out that right, and the refusal to exclude them was erroneous.

Noonan vs. Bradley, 9 *Wallace*, 394.

II.

The exemplification of records of the Supreme Court of the State of New York, introduced in evidence by the plaintiff, did not contain legal proof of the existence of the judgment described in the complaint, and it should have been excluded.

Ever since the commencement of this action in which the records referred to were made, the following statutes have been in force in the State of New York:

SEC. 279. The clerk shall keep, among the records of the court, a book for the entry of judgments, to be called the "Judgment-book."

SEC. 280. The judgment shall be entered in the judgment-book, and shall specify clearly the relief granted, or other determination of the action.

SEC. 281. Unless the party or his attorney shall furnish a judgment will, the clerk, immediately after entering the judgment shall attach together and file the following papers, which shall constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits, and necessarily affecting the judgment.

Voorhies's New York Annotated Code, (Ed. of 1870,) *pp.* 428–429.

Under these provisions of statute, there can be no judgment in actions at law in the Supreme Court of the State of New York, except the formal judgment drawn up and entered in the judgment-book; and in such actions, until formal judgment is drawn up and entered in the judgment-book, no judgment is pronounced by the court.

Butler vs. Lee, 33 *How., Pr.,* 251.

Same case, 3 *Keyes,* 76.

Hence if any judgment in the action of *Chapman vs. Gordon, et al.*, was ever rendered in favor of the plaintiff for damages claimed by him, such judgment was formally drawn up, and entered in the judgment book, and a copy of it was included in the judgment roll.

But no copy of any such judgment was contained in the exemplification offered in evidence by the plaintiff upon the trial.

The exemplification contained only a copy of a judgment for the recovery of costs on appeal to the general term, amounting to $61.64 ; and copies of certain recitals that judgment had been rendered for damages claimed in the complaint. The judgment for costs on appeal is not the judgment declared on in the present suit ; and the only evidence embodied in the exemplification of the existence of the judgment here declared on, is found in the recitals mentioned.

But those recitals were not competent evidence to prove the existence of the judgment. The existence of the judgment, its character and amount, could be lawfully proven only by the production of a duly authenticated copy of the judgment itself. All which the exemplification contained, asserting the existence of the judgment, could not amount to more than evidence of its existence of a merely secondary character.

If the original judgment, and the copy of it contained in the judgment roll, were both lost or destroyed, undoubtedly the recitals contained in the exemplification would be legal and sufficient evidence to prove the existence of the judgment ; but no such case is here presented.

The defendant was legally entitled to insist upon the production by the plaintiff of the best evidence of the existence of the judgment of which the nature of the fact to be proven admitted ; and the plaintiff was not at liberty to put him off with evidence of a lower nature.

It is true, that in some cases this court has held records containing mere recitals of the rendition of judgment to be legal evidence of the facts recited.

P. W. & B. R. R. Co. vs. Howard, 13 *How.*, 307.
W. A. & G. Steam Packet Co. vs. Sickles, 24 *do.*, 333.

But the decisions in all such cases have been expressly put on the ground that the records offered were all that, by the practice of the courts by which they were made, were kept of the facts sought to be proven.

Thus the Court, instead of disregarding the rule that the best evidence of which the nature of the fact to be proven admits, must always be adduced to prove it, merely followed out that rule. The reason why the Court admitted the records which it did was the simple one that such records constituted all that there were or had been of the facts sought to be proven.

But here the case is totally different. The statutes of the State of New York require the Courts of that State, and it is their practice, to keep full formal records of their proceedings.

The cases cited show it to be the established doctrine of this Court, as it is believed to be that of every other court which recognizes the binding force of the English common law, that whenever by the practice of a court full records of a fact are required to be kept, such fact can be proven only by the production of records of that character, or by showing their former existence and subsequent destruction.

III.

The certified copy of record of letters testamentary running to Snow and Clark, offered in evidence by the plaintiff to prove Snow to be executor of Gordon's will, was not competent evidence to prove that fact, and the same should have been excluded.

Since prior to Gordon's death, the following statutes have been in force in the State of Minnesota :—

SEC. 5. No person is liable to any action as executor of his own wrong, for having taken, received, or interfered with the property of a deceased person ; but is responsible to the

executor, as general or special administrator of such deceased person, for the value of all property so taken or received, and for all damages caused by his acts, to the estate of the deceased.

General Stats. of Minn., Chap. 77, *sec.* 5, *p.* 546.

SECTION 1. When a will is duly proved and allowed, the probate court shall issue letters testamentary thereon to the executor named therein, if he be legally competent, and accepts the trust and gives bond as required by law.

SEC. 2. Every executor, before entering upon the execution of his trust, and before letters testamentary are issued, shall give bond to the judge of probate in such reasonable sum as he may direct, with one or more sufficient sureties, with conditions as follows: to make and return to the probate court, within three months, a true and perfect inventory of all goods, chattels, rights, credits, and estate of the deceased, which shall come to his possession or knowledge, or to the possession of any other person for him; to administer according to law and the will of the testator, all his goods, chattels, rights, credits, and estate, which shall at any time come to his possession, or to the possession of any other person for him, and out of the same pay and discharge all debts, legacies, and charges, chargeable on the same, or such dividends thereon as are ordered and decreed by the probate court; to render a true and just account of his administration to the probate court within one year, and at any other time when required by such court; to perform all orders and decrees of the probate court, by the executor to be performed in the premises.

SEC. 4. No person named as executor in a will, who neglects to accept the trust, or give bond as prescribed in this chapter, for twenty days after the probate of such will, shall intermeddle or act as executor.

Gen. Stats. of Minn., Chap. 50, *Secs.* 1, 2, *and* 4, *p.* 367.

These statutes prevent the bringing of suits against persons as executors, who have merely constituted themselves such by their own acts.

Since the passage of these statutes, if a man sued as executor denies that he is such, the plaintiff can succeed only by showing the defendant to have been constituted executor in a regular and lawful mode.

What that mode is, the statutes themselves point out.

The will must be proven in, and be allowed by a probate

court of competent jurisdiction; the trust of executorship must be duly accepted; bonds for the faithful performance of the duties of the office must be given; and letters-testamentary must be actually issued.

The reasons why only those who have become executors in accordance with the forms prescribed by the statutes of the State, are liable to be sued as executors, are to be found in the plan provided by those statutes for administering the estates of deceased persons.

It will be shown further on, that, by the laws of the State of Minnesota, jurisdiction over the estates of deceased persons is committed to special courts termed probate courts; that the probate courts of the State alone have jurisdiction to direct the distribution of such estates; and that although under certain conditions debts against an estate may be established by action, debts so established are not thereby put in any better position than other debts, and the question what assets are applicable to their payment, still remains with the probate court, as in the case of other debts.

The court in which an action is brought in the State of Minnesota, against an executor, to establish a debt against the estate of the testator in his hands, can do no more than to render a judgment which shall determine that the debt in suit is an obligation against the estate which must be provided for on an equality with other debts of the same class; the court cannot determine what amount, if any, of the assets in the executor's hands will be applicable to the payment of the judgment; that fact must be determined by the probate court in which the administration of the estate is going on.

Hence, it would seem to follow, that an action to establish an indebtedness against the estate of deceased person, can, in the State of Minnesota, only be brought against that person whom the probate court having the administration in hand is bound to treat as the representative of the estate. Certainly a probate court would not even be authorized, much less would it be under

duty, to direct the payment of a judgment rendered on the debt of a deceased person, out of his assets under its control, when such judgment was not rendered against an executor constituted by itself.

But an executor cannot be constituted by a probate court of the State of Minnesota, except in the mode prescribed by statute.

The jurisdiction of the court is limited, and is conferred by statute; and it would therefore seem to follow, that an executor can only be constituted by proceedings had in accordance with the statutes.

In the case at bar no offer was made to show that Snow had ever become entitled to act as executor of Gordon's will, or liable to be sued as such. It is true, the will was allowed upon his application; but that fact did not constitute him executor under the laws of the State. Nothing could do that except the lawful issuance to him of letters-testamentary, after acceptance of the trust and giving of the bond required by law.

The evidence offered to prove Snow to be executor only showed this; that upon the allowance of the will, the probate judge had gotten in readiness letters-testamentary to to be issued to Snow and Clark whenever they should comply with the provisions of law in respect to the acceptance of the trust and the giving of a bond.

There was no evidence to show that the letters had ever been in fact issued to Snow and Clark; nor any to show that Snow or Clark had ever qualified themselves to receive them.

Because the probate judge got letters in readiness to issue amounts to nothing. That did not make Snow or Clark Executors. That had no more effect than the preparation of a deed without the delivery of it.

Letters-testamentary remaining in the hands of a probate judge are of no legal effect whatever; at least until the person to whom they run performs the conditions upon performance of which the law says letters shall alone be issued.

In this case the plaintiff was bound to produce some record showing that the letters had been actually issued; or at the very least showing that Clark and Snow had become entitled to receive them by accepting the trust and giving bond.

But no such record was produced. By itself, and without evidence of their actual issuance, the copy of letters which was offered by the plaintiff was incompetent; and it should have been excluded.

IV.

The deposition of George R. Chapman; the correspondence between Snow and others; and the testimony of R. B. Galusha, offered in evidence by the plaintiff, were all irrelevant to any issue upon trial, and all of them should have been excluded.

The only issues raised by the pleadings, and hence the only ones on trial, were the following:

1. Was the plaintiff an executor of Eunice Chapman's will, authorized to recover her estate within the State of Minnesota?

The only evidence admissible on the affirmative side of this issue would have been, either letters testamentary duly issued to the plaintiff in the State of Minnesota; or letters testamentary duly issued to the plaintiff elsewhere, with the certificate of some probate court of the State of Minnesota, that duly authenticated copies of such letters had, previous to the beginning of the action, been filed therein.

2. Did the judgment described in the complaint exist?

The only evidence admissible on the affirmative side of this issue would have been an exemplification of the judgment itself; there being no pretence of its loss or destruction.

3. Was Snow, an executor of Gordon's will, liable to be sued in that capacity for Gordon's debts?

The only evidence admissible on the affirmative side of this issue would have been, letters testamentary from the probate court of Le Sueur County, running to Snow, or an authenticated copy thereof, together with proper proof of the actual issuance of the letters to Snow, and exemplifications of the record of his acceptance of the trust, and of his bond for the faithful performance of his duties as executor.

4. Had any of Gordon's estate ever come to Snow's hands?

None of the testimony in question related to this issue.

Such being the issues raised by the pleadings, and on trial, as the testimony in question had no bearing upon any of them, it must have been wholly irrelevant, and entirely inadmissible.

V.

The defendant's motion to dismiss was well founded, and it should have been granted.

When the plaintiff rested his case, he had failed to adduce any competent evidence to at least the following points:

1. That letters-testamentary had been issued to him in the State of Minnesota; or that he had filed an authenticated copy of his New York letters in any probate court of the State of Minnesota.

2. That the judgment had been rendered in favor of the plaintiff, in the suit against Gordon, which is described in the complaint.

3. That letters testamentary on Gordon's will had ever been issued to Snow, or that Snow had ever accepted the trust of executorship, or given bond as required by law.

See ante pp.

In order to make out the cause of action stated in his complaint, it was necessary for the plaintiff to establish all the foregoing propositions; failure on his part to establish any one of them was failure to establish his case.

The plaintiff having failed to make out any of the propositions mentioned, he failed to make out his cause of action; and the defendant's motion to dismiss the suit ought to have been granted, if such a motion could, in accordance with law, have been granted.

Since prior to the time of the adoption by the court below of the rule hereinbefore quoted, the following statute has been in force in the State of Minnesota, relating to the practice of the District Courts of that State.

SEC. 242. The action may be dismissed without a final determination of its merits, in the following cases:

* * * * * * *

Third. By the Court, where, upon the trial, and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his claim, or cause of action, or right to recover.

* * * * * * *

Gen. Stats. of Minn., chap. 66, *sec.* 242, *p.* 484.

The rule which the court below had adopted, made this statute a rule governing its own procedure, unless the statute in some way conflicted with the constitution or laws of the United States.

But there could be no such conflict in cases tried as this one was tried—by the court, without a jury.

It is undoubtedly the doctrine of this court, that an action under trial by jury, in a federal court, cannot, without the plaintiff's consent, be dismissed by the court for failure of evidence. But that doctrine is merely a deduction from these premises—that the constitution and acts of Congress guarantee right of trial by jury, and that for the court to interpose and take a case from the jury on the ground of failure of evidence, would be to deprive the plaintiff of this right.

It is plain, therefore, that the doctrine that non-suit is not allowable in the federal courts, cannot logically extend to cases where the plaintiff has expressly waived all right to trial by jury, as the plaintiff had done in this case.

Since the plaintiff's evidence, adduced upon the trial, utterly failed on at least three essential points, and since no conflict between the statute quoted, and the constitution and laws of the United States can be pointed out, it must follow that the defendant was entitled to have his motion to dismiss granted.

VI.

The judgment is wholly erroneous in form and substance, even if the plaintiff showed himself entitled to recover.

As the judgment is recorded, it is a judgment against Snow individually, and is immediately leviable out of his proper goods and chattels.

Siglar us. Haywood, 8 *Wheaton*, 675.

The form of the judgment was, undoubtedly, the result of mistake; but, under the rule laid down in *Exp. Lange*, 18 *Wallace*, 163, it would now be too late for the mistake to be corrected in the court which rendered the judgment; only this court would be competent to do that.

As this court held in *Siglar vs. Haywood*, it would be error in a suit where the issues are what they are here, to render a judgment against the defendant *de bonis propriis*, even if the plaintiff made out his right to recover, and the court in which judgment was rendered could proceed directly against the property of the deceased, in the hands of the personal representative, as was the case at common law. In other words, if common-law rules and methods for the enforcement of the debts of a deceased person, against his estate in the hands of his personal representatives, were in force in the

State of Minnesota, the judgment as recorded in this suit would be wholly erroneous.

There is no allegation that Snow ever wasted any of the estate; and hence there is no ground disclosed in the complaint, on which he could be made personally liable for Gordon's debt in any event.

Besides, Snow having pleaded the essence of a plea of *plene administravit*—that is to say, no assets in his hands before or at the time of the commencement of the action—if the rules of the common law governed this action, no judgment whatever could be rendered in the action.

At common law, when a plea amounting to *plene administravit* was on the record, it was incumbent on the jury to find the amount of assets in the defendant's hands; and judgment could only be rendered against the defendant and for the amount so found.

Williams on Executors, (*Ed. of* 1867,) *p.* 1804.
do *do* *p.* 1824.
Fairfax vs. Fairfax, 5 *Cranch.*, 17.
Siglar vs. Haywood, 8 *Wh.*, 675.

In this case, the court made no finding watever as to assets; and consequently, if the common law were to control, no judgment, for the want of any such finding, could be rendered.

But the rules of the common law, respecting the mode of distributing the estates of deceased persons among their creditors, have never obtained in the State of Minnesota.

By the constitution and statutes of that State, jurisdiction over the proof of wills, and over the settlement and distribution among creditors and others entitled, of the estates of dead persons, is committed to special tribunals, called probate courts, one of which exists in each organized county of of the State.

Const. of Minn., *Art.* 6, *Sec.* 7.
Gen. Stats. of Minn., *Chap.* 49, *page* 364.

As soon as an inhabitant of the State dies, his estate at once falls under the jurisdiction and control of the probate court of the county where he resided, for administration; and, as appears from portions of the statutes already quoted, even those named as executors in a will have no rights, except of a merely conservative character, in connection with the testator's property, until authority has been given them by the proper probate court; nor are they, until such authority has been given, even liable to be treated as representatives of the estate by creditors.

See ante p.

The laws of the State contemplate that the estates of deceased persons shall, in all cases, be settled as insolvent estates.

The methods of establishing and paying debts against estates is set forth in Chapter 53 of the General Statutes of Minnesota.

Sections 1–19 of this chapter provide for the appointment by the probate court where the administration is going on, of a board of commissioners to hear and adjudicate claims against the deceased; and require all claims against the estate of the deceased to be established before such commissioners.

Sections 34–35 of the chapter are in the following terms:

SEC. 34. If the assets which the executor or administrator has received, and which can be appropriated to the payment of debts are not sufficient therefor, he shall after paying the necessary expenses of his funeral, last sickness, and administration, pay the debts against the estate in the following order:

First. Debts having a preference by the laws of the United States.

Second. Public rates and taxes.

Third. Judgments docketed, according to the priority thereof.

Fourth. Debts due to other creditors.

SEC. 35. No preference shall be given in the payment of any debt over other debts of the same class, except those speci-

fied in the third class; nor shall a debt due and payable be entitled to preference over debts not due; nor shall the commencement of an action for the recovery of any debt, or the obtaining a judgment thereon against the executor or administrator, entitle such debt to any preference over others of the same class.

Gen. Stats. of Minn., p. 379.

It is, undoubtedly, the doctrine of this Court, that State laws requiring creditors of deceased persons to establish their claims in special tribunals of State creation, are not binding upon those whose citizenship entitles them to sue in the federal courts; but that, on the contrary, such persons may establish their claims in the federal courts, by the only mode of procedure in use in those courts, that is to say, by suit against the personal representatives; and that claims so established must be recognized and provided for by the State court of probate having the administration in charge, on an equal footing with other debts of the same class established in the State Courts.

Suydam vs. Brodenax, 14 *Pet.*, 67.

Union Bank vs. Jolly's Executors, 18 *How.*, 503.

Green's Adm. vs. Creighton, 23 *How.*, 90.

Still it is an equally well settled doctrine of this Court, that where, by the laws of a State, the administration of the estates of dead persons is committed to special tribunals, and such jurisdiction has attached in any case, the federal courts sitting in the same State will not, at the suit of creditors, assume jurisdiction over the assets; but will, after allowing the creditor to establish his claim by suit and judgment in themselves, remit him to the State Court for the determination of how much of the assets are applicable to payment of his claim as established, and for the distribution to him of the share of the assets to which he may be entitled.

Yonley vs. Lavender, 21 *Wallace*, 276.

In this case, upon the death of Gordon, if he left any property within the State of Minnesota, the jurisdiction

of the probate court for Le Sueur County at once attached to it.

Such jurisdiction was exclusive of that of the United States Circuit Court sitting within that State; and the latter named Court has never had any authority over such property.

If Snow ever had any lawful connection with the administration of Gordon's estate, it was as the officer of the Probate Court of Le Sueur County.

That Probate Court has been, and it is, in the first instance, vested with exclusive jurisdiction to determine what estate was left by Gordon; what portion of the assets of that estate are applicable to the payment of Gordon's debts; and what part of such portion is applicable to the payment of the debts of each class of creditors, and finally of the debt of each particular creditor.

The federal Courts sitting within the State of Minnesota, have never had jurisdiction to determine any of these things; they have never been authorized to take an account of the assets of Gordon's estate, nor to give any creditor a priority of payment out of those assets, by the rendition of judgment in his favor for the amount of the debt against one claimed to be the representative of the estate.

The only judgment which, under the laws of the United States, and of the State of Minnesota, the Court below had power to render in this action, was one against Snow strictly in a representative capacity, and containing the direction that the damages awarded be paid out of the assets of Gordon's estate, in the course of administration.

For the reasons stated, the judgment of the Court below should be reversed, and a new trial should be granted.

W. P. Clough,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1875.

EDWARD R. SMITH,
EXECUTOR OF THE LAST WILL OF GEORGE D. SNOW, DECEASED, PLAINTIFF IN ERROR,
vs.
GEORGE W. CHAPMAN,
EXECUTOR OF EUNICE CHAPMAN, DECEASED.

No. 12.

BRIEF OF COUNSEL OF DEFENDANT IN ERROR.

This is a case removed by writ of error from the circuit court of the United States for the district of Minnesota.

Rec., pp. 1 and 2.

Chapman, as executor, brought his action by complaint against George D. Snow and P. B. Clark, executors of the last will of John Gordon, against whom a judgment had been rendered in New York, in his lifetime, for the sum of $4,759.80, and for which Chapman prayed judgment in Minnesota, with interest from the 4th January, 1864, and costs.

See Rec., pp. 2 and 3.

George D. Snow, one of the defendants, was alone served with summons to appear and answer.

See Rec., p. 4.

In his answer Snow, said that he was not, and never had been, executor of the last will of Gordon. (See Rec., p. 5, fol. 13.) And answered further by a general denial.

See Rec., p. 6, fol. 15.

The case was tried, by agreement, by the court alone, without a jury.

See Rec., p. 7, fols. 16 and 17.

The court below rendered a judgment in favor of Chapman, and against Snow, for $7,648.33.

See Rec., p. 38, fols. 92 and 93.

There are several bills of exceptions taken to the rulings of the court below on the trial by the counsel of plaintiff in error.

First. To the introduction of duly certified copies of the record of the last will and testament of Eunice Chapman, and of letters testamentary issued thereon to plaintiff below, on the ground plaintiff could not bring an action as executor in the State of Minnesota unless he showed that he had been authorized as such executor by the State courts to bring suit.

There was no error in the ruling of the court. The plaintiff was a citizen of the State of New York, and as such had a right to sue in the circuit court of the United States.

See U. S. Const., Article III, sec. 2.
See Rev. Stat., sec. 629, par. first.
See Childress, Ex., *vs.* Emory *et als.*, Ex., 8 Wheaton, p. 642.

SECOND. To the admission of the copy of the judgment-roll from the supreme court, Kings county, New York, in the case of Eunice Chapman *vs.* James W. Brooks, John Gordon, and James Root, on the ground of variance between the judgment mentioned in the complaint and the judgment shown by said roll.

There was in fact a variance, as the judgment alleged in the complaint was against John Gordon only, while that which appeared in the roll was against John Gordon and two others; but the judge of the circuit court finding that the defendant had not been misled or prejudiced, and applying the rules of practice of the State of Minnesota, which had been adopted in the United States circuit court, allowing such amendments, he permitted the plaintiff to amend his complaint so as to make it correspond with the judgment-roll from New York, which was done before judgment.

In this the circuit court did not err.

See Rev. Stat., sec. 914.

The circuit court possessed and exercised the power of adopting the practice of Minnesota, which appears to authorize such an amendment.

THIRD. A. The first section of the third exception mentioned here (see Rec., p. 9, fol. 21) presents no difficulty. The declaration or complaint alleges that the plaintiff recovered the judgment in question in an action in the supreme court of the State of New York for the county of Kings, (see Rec., p. 3, fol. 8.) This surely is sufficient.

B. The second section of the exception is to the evidence of the judgment, and the objections urged are at once set at rest by the judgment of the supreme court of the State of New York, sitting in general term.

See Rec., p. 19, fol. 48.

C. The third ground of exception is set at rest by the application of the principle contained in the maxim, "*Omnia præsumuntur solennitur et vite esse acta.*" It is a presumption that when a court of competent jurisdiction, with the parties before it, has given a judgment, that all the facts necessary to such a legal conclusion were duly proved. The circuit court of the United States in Minnesota was not sitting as an appellate tribunal to revise the judgment of the supreme court of the State of New York, but to give to it the same force and effect which it carried in the State where it was rendered.

FOURTH. The next exception was to the introduction in evidence of a duly certified copy of the record of the probate court of Le Sueur county, Minnesota, showing the application of Snow as executor of Gordon for the probate of the will, (see document B, Rec., pp. 19 and 20, fols. 49 and 50;) and at the same time exception was taken to the introduction in evidence of a certified copy of the will of Gordon, and of the decree of the probate court of Le Sueur county, Minnesota, (see Doc. C, Rec., pp. 20 to 24, fols. 51 to 60, inclusive,) on the ground that the said paper did not show that the court of Le Sueur county had jurisdiction of the subject of the will, or lawful authority to probate it.

The objection is stated to be founded on the provisions of section 7 of chapter 49, page 365, of the General Statutes of the State of Minnesota.

The law referred to is found in the Digest, and reads as follows:

Sec. 7, Chap. 49, p. 365, Stat. Minnesota, Revision of 1866.

"*Proceedings in Probate Court.*

"SECTION 7. There are no pleadings in probate courts, "but the proceedings shall conform to the statute, and "may be instituted upon the application of a party, verbal "or written, which, when verbal, shall be entered in the "minutes of the court, and when written shall be filed. "The judge of probate has the same power to examine "witnesses and parties on oath, to compel their attendance, "to preserve order during any proceedings before him, and "punish contempts, as a district judge possesses under the "provisions of law. He may exercise his powers, except "when otherwise provided by law, by means of—

"*First.* A citation to a party.

"*Second.* An affidavit, deposition, examination, or state-"ment under oath of a party or witness, or other legal and "competent evidence.

"*Third.* A subpœna or attachment.

"*Fourth.* Orders, judgments, and decrees.

"*Fifth.* An execution, warrant, or other process to en-"force them."

We submit that there is nothing in the action of the court below which conflicts with the provisions of the State statute, and that the evidence was properly admitted.

See Rec., p. 10, fol. 25.

FIFTH. The next exception was to the introduction in evidence of the letters of testamentary executorship under the will of Gordon to Snow. (See Doc. D, Rec., pp. 24 and 25, fols. 61 to 63.) The ground of exception was that the said record did not show that Snow had ever accepted the trust or given the bond required by the statute, which, it is averred, is a matter touching the jurisdiction of the probate court, and should have been shown. The bill of exceptions refers to General Statutes of Minnesota, p. 367, ch. 50, sec. 2, in support of the objection.

That section reads as follows:

Revision of 1866—General Statutes of Minnesota.

"CHAPTER L.

"*Letters Testamentary and other Proceedings on the Probate*
"*of a Will.*

"SEC. 2. Every executor, before entering upon the exe-
"cution of his trust, and before letters testamentary are
"issued, shall give bond to the judge of probate in such
"reasonable sum as he may direct, with one or more suffi-
"cient sureties, with conditions as follows: To make and
"return to the probate court, within three months, a true
"and perfect inventory of all goods, chattels, rights, cred-
"its, and estate of the deceased which shall come in his
"possession or knowledge, or to the possession of any
"other person for him; to administer according to law and
"the will of the testator all his goods, chattels, rights,
"credits, and estate, which shall at any time come to his
"possession, or to the possession of any other person for
"him, and out of the same pay and discharge all debts,
"legacies, and charges chargeable on the same, or such
"dividends thereon as are ordered and decreed by the pro-
"bate court; to render a true and just account of his ad-

" ministration to the probate court within one year, and at " any other time when required by such court; to perform " all orders and decrees of the probate court by the exec- " utor to be performed in the premises."

General Stat. Minn'a, p. 367, chap. 50, sec. 2.
Also, Bissell, p. 651, chap. 35, title II, sec. 37.

From the reading of this section it becomes very evident there is nothing in the objection. It was the proper probate court which issued the letters of testamentary executorship, and the presumption is that the judge did his duty and complied with the preliminary formalities.

Sixth. The next exception. (Rec., pages 10, foot, and 11, top, folios 27 and 28.) The plaintiff in the court below had called upon defendant to produce eight letters in his possession, described by date, names of writers, and address, and also to produce all other letters which he, the plaintiff below, might have received from the said writers in reference to the demand; and the said letters not having been produced on the trial by the defendant below, the plaintiff's counsel offered in evidence the deposition of plaintiff himself, taken under a commission in New York, together with certain letters by the defendant below, proven to have been received by Galusha, counsel of plaintiff below.

There were two objections:

First. That the deposition does not sufficiently identify the letters with the notice to produce, or sufficiently state the contents of them—except of one, which the defendant below produced—to make the deposition admissible.

On turning to the deposition, commencing on page 34, folio 83, it will be found that the witness details with suf-

ficient accuracy to render it out of the question that Snow, the defendant below, could have been deceived the contents of the letters. (See his, plaintiff's below, answer to fifth direct interrogatory, Rec., p. 35, folios 86 and 87.) It must be remarked that Snow does not deny that he received letters, and if he had been in good faith he would have at once produced them; so the court below certainly did not err in admitting the secondary evidence.

As for the second objection, that the contents of the letters were immaterial, it is of no importance, the cause having been heard without a jury. Even were the contents not material, which, however, is not the case, no harm could have accrued to Snow, the defendant. Hence this objection was also properly overruled.

SEVENTH. The next exception is on Rec., page 11, foot folios 29 and 30, and was taken to the admission of certain letters offered in evidence by counsel of plaintiff in the court below. These letters, marked J, K, L, M, N, O, P, are found in the record at pages 27, 28, 29, and 30, folios 69 to 72. The ground of objection was, that they were immaterial to the issues in the case. They are admitted to be genuine, and they are the correspondence of the counsel of plaintiff with the defendant; they have a direct bearon the case, and serve to make clear the allegations of the plaintiff below. There was no error, we submit, in the ruling of the court below upon them.

EIGHTH. The next exception is to be found on page 12 of the Record, folios 30 and 31.

The counsel of plaintiff below having testified to conversations he had with Snow, the defendant, tending to show the bad faith of Snow endeavoring by unjust means to escape payment of the claim, the counsel of defendant

objected to the testimony on the ground that the same was immaterial. It is clear the court below did not err in overruling this objection; such evidence had a direct bearing upon the question of Snow's liability.

NINTH. The next exception, on Rec., p. 12, folios 31 to 33, is to the action of the court overruling the motion of Snow's counsel to dismiss the action.

Three grounds of dismissal are alleged. The second and third grounds are reiterations of the objections made and overruled to the introduction of certain evidence, and have already been sufficiently discussed. The first ground, that plaintiff below had failed to show a cause of action by pleadings or proof, will be noticed further on.

TENTH. The tenth exception of Snow's counsel was to a question propounded, on cross-examination, to Snow himself. (See Record, p. 13, folio 35.) Snow was asked, "Did "you receive into your hands any assets of Mr. Gordon?"

The objections were, *first*, that it was not cross-examination upon any subject on which the witness had testified. The witness had sworn in chief that he had never qualified or accepted the trust of the executorship of Gordon, and that he had never made an inventory or acted in any capacity as executor, and that he had never held himself out to Chapman or Galusha as executor. Now, it was clearly competent to ask him if he had not taken possession of personal property of the estate, because such was an act he only had a right to do as executor, and the objection, therefore, was properly overruled; and for the purpose of then showing what Snow really did take such possession, it was clearly unnecessary to lay it in the declaration, hence the second objection of want of allegations in the pleadings is equally untenable.

POINTS.

FIRST. Snow was the executor of Gordon's will.

Snow applied, as one of the executors named in the will, to the probate judge of Le Sueur county, Minnesota, to appoint a time and place for proving the will, allowing it, and granting a decree of probate.

Rec., page 19, folio 49.

He is named in the will as an executor.

Rec., p. 20, folio 51.

And the will shows that Gordon left a very large amount of personal and real estate in Minnesota, of which State he was a resident at the time of his decease. He left a legacy of $30,000 to Snow's wife, (Rec., p. 21, folio 53,) and made Snow himself his residuary legatee. (See Rec., p. 22, fol. 56.) The will was dated 14th May, 1867, (see Rec., p. 23, folio 57,) about two weeks before Snow made application for probate.

On the first day of July, 1867, the will was duly proved before the probate judge, was ordered to be recorded, and the executors therein named. Snow and Clark were fully empowered to execute and carry out the provisions of the will.

See Rec., p. 23, foot, and 24, top.

Letters of testamentary executorship were issued to Snow and Clark on the same day.

See Rec., pages 24 and 25.

His correspondence shows that he (Snow) acted as executor.

See the letters marked on pages 25 to 29 of the Record.

SECOND. Snow took possession of the personal property of Gordon in Minnesota, as he swears himself.

See Rec., p. 13, folio 35.

In the letter addressed by Chapman to Snow, dated New York, October 23, 1867, Chapman says: "We are in- "formed that the money, $34,000, is now in your hands."

See Rec., p. 36, folio 89.

Snow answered that letter on 30th October, 1867, and does not deny the assets, but says at the end of his letter: "The estate of John Gordon is in the probate of this "county, and if any debts are against the estate must be "presented to me within the year."

See Rec., p. 26, fol. 65.

What meaning could there be to this expression if he were not executor?

Snow denies that he qualified as executor, (see Rec., p. 13, fol. 33, and fol. 34;) but in all these denials, similar to those he made in his answer under oath, he is contradicted by the record of the probate court of Le Sueur county, which shows that letters of testamentary executorship were issued to him, and the legal presumption is that he had done all the acts required by law for his qualification before the judge of probate granted him the letters.

THIRD. The defendant below, Snow, having denied he was executor, (*ne unques executor*,) and the fact having been proved that he was executor, and the estate having

been fully administered, judgment was properly given against him *de bonis propriis.*

See Williams on Executors, 5th American Edition, page 1787.
See Lightfoot *vs.* Cole, 1 Wisconsin, p. 26.

Fourth. In addition to his position as testamentary executor, Snow was the residuary legatee under Gordon's will, (see Rec., p. 22, fol. 56, item "twentieth;") and under the laws of Minnesota he was simply required to give bond in such sum and with such sureties as the court might direct, conditioned only to pay the debts and legacies, and was not obliged to make an inventory.

See Public Statutes of Minnesota, 1848–1858, St. Paul, 1859.
Bissel's Statutes at Large, ch. 35, sec. 39, p. 651.

Hence Snow was bound for the debt now sued for.

Fifth. Snow, as residuary legatee, received of the estate of John Gordon, in gold coin of the United States, $3,879.64, a note secured by mortgage on real estate in San Francisco, $4,000, and a fifty-vara lot in the same city, No. 5, in block 350.

See Rec., p. 30, fol. 73.
" p. 31, fols. 76, 77.
" p. 32, fols. 78 and 79.

From the last page cited it appears that Snow had received the residue of the estate antecedent to the 12th January, 1869, date of the discharge of the executor in California, who settled with him; and hence that he had this property in his possession when he filed his answer

under oath in this suit, which was on the 29th July, 1869, (see Rec., p. 7, fol. 16,) and of course before he deposed as he did on the trial.

See Rec., p. 13, fol. 35.

SIXTH. The circuit court, therefore, did not err in its judgment, since Snow was legally liable for the debt in both capacities, as executor denying the trust and as universal legatee.

All of which is respectfully submitted.

DURANT & HORNOR,
For Def'dt in error.

DECEMBER 30, 1875.